Supreme Court, U.S.
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No. ——

In The Supreme Court of the United States

October Term, 1996

Brown University, *et al.*,
Petitioners,

v.

Amy Cohen, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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39pp

QUESTIONS PRESENTED

1. Whether a university that seeks to offer varsity teams that will accommodate the athletic interests of qualified men and women equally effectively can be found liable for "discrimination" on the "basis of sex" within the meaning of 20 U.S.C. § 1681(a) of Title IX based on evidence that (1) the percentage of women participating in varsity athletics is lower than the percentage of women in the student body, without regard to the percentage of women in the pool of qualified athletes seeking to participate in varsity sports; and (2) there are some qualified women in the student body who want to play on a viable varsity team that is not being funded as part of the university's athletic program, without regard to the number of similarly situated men.

2. Whether 20 U.S.C. § 1681(b) of Title IX—which provides that "nothing" in Section 1681(a) "shall be interpreted to require" a university "to grant preferential or disparate treatment" on account of an "imbalance" between the gender ratio of a federally supported program and "any community"—prohibits the adoption of standards governing liability that effectively require universities to afford varsity opportunities to qualified women in preference to qualified men in an effort to make the gender ratio of the varsity athletic program conform to the gender ratio of the student body.

3. Whether an interpretation of 20 U.S.C. § 1681 that effectively requires universities receiving federal funds to grant preferential treatment to women athletes in order to redress real or perceived societal discrimination would raise a serious question under the Equal Protection Guarantee of the Constitution by denying similarly situated male athletes an equal opportunity to participate in varsity sports.

PARTIES TO THE PROCEEDING

The petitioners in this case are Brown University, Vartan Gregorian, in his official capacity as President of Brown University, and David Roach, in his official capacity as Athletic Director of Brown University. The respondents are Amy Cohen, Eileen Rocchio, Nicole A. Turgeon, Karen A. McDonald, Melissa Kuroda, Lisa C. Stern, Jennifer Hsu, Jennifer E. Cloud, Darcy Shearer, Jody Budge, and Megan Hull, each individually and on behalf of all others similarly situated.

RULE 29.1 STATEMENT

Petitioner Brown University is a not for profit corporation. It has no parent or subsidiaries. Petitioners Vartan Gregorian and David Roach are individuals.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Brown University ("Brown"), Vartan Gregorian, and David Roach (referred to collectively as "Brown") hereby request this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals affirming the district court's judgment that Brown violated Title IX, and reversing and remanding the district court's remedial relief (App. at 1a), is reported at 101 F.3d 155 (1st Cir. 1996) ("*Cohen* IV"). The opinion and order of the district court finding that Brown violated Title IX (App. at 85a) are reported at 879 F. Supp. 185 (D.R.I. 1995) ("*Cohen* III"). The district court's modified order and opinion (App. at 150a) are not reported. The opinion of the Court of Appeals affirming the district court's entry of a preliminary injunction (App. at 167a) is reported at 991 F.2d 888 (1st Cir. 1993) ("*Cohen* II"). The opinion and order of the district court granting a preliminary injunction (App. at 202a) are reported at 809 F. Supp. 978 (D.R.I. 1992) ("*Cohen* I").

GROUNDS FOR JURISDICTION

The judgment of the Court of Appeals (App. at 1a) was entered on November 21, 1996. No petition for rehearing was filed. Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case concerns Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, 34 C.F.R. § 106.41, and the Equal Protection Guarantee of the Fifth Amendment to the United States Constitution. The provisions at issue are set forth in the Appendix at 251-316a.

STATEMENT OF THE CASE

At the time of the trial in this case, the court found that women represented 51% of the student body at Brown University, and had the opportunity to participate on 16 women's varsity teams and two co-ed teams. *Cohen* III, App. at 98a, 96-97a & n.20. Despite this wealth of opportunity for women, the First Circuit held that Brown engaged in sex discrimination prohibited by Title IX, 20 U.S.C. § 1681, because its athletic program—which was designed to accommodate the interests and abilities of *all* athletes—did not produce "gender parity between its student body and its athletic lineup." *Cohen* II, App. at 181a. The First Circuit determined that the statistical difference between the gender composition of Brown's student body and its athletic program supported an inference of discrimination based upon an irrebutable presumption that "women, given the opportunity, will naturally participate in athletics in numbers equal to men." *Id.*, App. at 187a.

The Court accordingly refused to consider overwhelming evidence that Brown's athletic program did not achieve "gender parity" with the student body because women did not represent 51% of the qualified athletes seeking to participate in varsity sports. As a result, the only feasible way that Brown could have complied with Title IX, as interpreted by the First Circuit, would have been to adopt a gender-conscious program, based on a numerical quota, to set aside up to 51% of its varsity positions for qualified women athletes. Had Brown followed that course, and thereby denied male athletes an equal opportunity to participate in varsity sports, it could have entered a "safe harbor" and "stay[ed] on the sunny side of Title IX." *Id.*, App. at 181a. The central issue here is whether a university's refusal to abandon a program based on equal opportunity for all qualified athletes in favor of one based on preferential treatment for women provides a basis for liability under Title IX.

A. The Statutory and Regulatory Framework

Title IX of the Education Amendments of 1972 prohibits sex discrimination in education programs or activities receiving federal financial assistance: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Section 1681 also explicitly prohibits the compelled use of preferences to create gender balance in university programs. Section 1681(b) states that "[n]othing" in Section 1681(a) "shall be interpreted to require" any institution "to grant preferential or disparate treatment to the members of one sex on account of an imbalance" between the "percentage of persons of that sex participating in . . . [a] federally supported program" and the "percentage of persons of that sex in any community, State, section, or other area." 20 U.S.C. § 1681(b).[1]

The Department of Health, Education & Welfare ("HEW") issued proposed implementing regulations concerning intercollegiate athletics in 1974.[2] *See* 39 Fed. Reg. 22,228, 22,230 (1974). Two sections of the proposed regulation would have required "affirmative efforts" to "equalize opportunities" for members of both sexes.

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[1] Representative Albert Quie, who introduced the language of Section 1681(b), explained that "this amendment would provide that there shall be no quotas in this sex antidiscrimination title" and that "a similar provision against quotas" is set forth "in section 703(j) of the Civil Rights Act of 1964." 117 Congressional Record 39,248, 39,261-62 (November 4, 1971). Section 1681 does not bar "consideration" of "statistical evidence" of "an imbalance." 20 U.S.C. § 1681(b).

[2] The Education Amendments of 1974 directed the Secretary of HEW to issue regulations "which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports." Javits Amendment, Pub. L. No. 93-380 § 844, 88 Stat. 612 (1974) (codified at 20 U.S.C. § 1681 note). Those regulations would become effective only if not vetoed by Congress and if signed by the President. *See* 20 U.S.C. § 1682.

Id. at 22,230. HEW eliminated those requirements from the final regulation because they "could be considered 'affirmative action,'" which is barred by Section 1681(b). *See* 40 Fed. Reg. 24,128, 24,134 (1975). Instead, the final regulation added a list of ten non-inclusive factors that the Secretary "will consider" to determine "[w]hether equal opportunities are available" for "members of both sexes" in college athletic programs. 34 C.F.R. § 106.41(c) (the "regulation"); 40 Fed. Reg. at 24,134.[3] No part of the regulation encourages or requires statistical balancing of any kind. *Id.*

In 1979, HEW issued a Policy Interpretation that the First Circuit relied upon to establish the legal standard for proving a violation of Title IX. *See* Policy Interpretation, 44 Fed. Reg. 71,413 (1979). The Policy Interpretation establishes a three-part standard to determine "whether the selection of sports and levels of competition effectively accommodate *the interests and abilities of members of both sexes*"—the first of the ten factors set forth in the regulation. 34 C.F.R. § 106.41(c)(1) (emphasis added). Universities will be found in compliance if:

> (1) "intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to the respective enrollments"; or
>
> (2) "the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest

[3] The ten factors include: "Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes; (2) the provision of equipment and supplies; (3) scheduling of games and practice time; (4) travel and per diem allowance; (5) opportunity to receive coaching and academic tutoring; (6) assignment and compensation of coaches and tutors; (7) provision of locker rooms, practice and competitive facilities; (8) provision of medical and training facilities and services; (9) provision of housing and dining facilities and services; (10) publicity." 34 C.F.R. § 106.41(c). The regulation became effective on July 21, 1975.

> and abilities of the members of [the underrepresented] sex"; or
>
> (3) "it can be demonstrated that the interests and abilities of the members of [the underrepresented] sex have been fully and effectively accommodated by the present program."

44 Fed. Reg. at 71,418. The Office For Civil Rights for the Department of Education ("OCR"), the agency now responsible for Title IX enforcement, interpreted this policy to mean that institutions are required to "meet the interests and abilities of women *to the same degree* as they meet the interests and abilities of men," and that they are "not requir[ed] . . . to offer . . . intercollegiate participation opportunities" that are "proportional" to the "division by sex of the total student enrollment." OCR Title IX Intercollegiate Athletics Investigator's Manual ("OCR Manual") at 122 (1980) (emphasis added). App. at 291-93a.

During the course of this litigation, OCR changed course, and adopted the First Circuit's interpretation of the three-part standard as its own. *See* "Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test" dated Jan. 16, 1996 and cover letter from Norma V. Cantu. App. at 294-316a. Under OCR's new interpretation of the first two parts of the standard, a university will be found to offer a nondiscriminatory selection of sports if the ratio of male and female athletes in its varsity program satisfies a numerical test—substantial proportionality with the gender ratio of the student body—or if the program numbers have continually increased towards that benchmark. *Id.*, App. at 305a, 307-09a. A university's failure to meet that numerical test can be excused under the third part of the standard, but only if the university funds all viable sports teams that qualified women in the student body would like to play. *Id.*, App. at 312-14a. *See also* Amicus Brief of the United States at 18, filed in *Cohen* IV, C.A. No. 95-2205 (January 26, 1996) (supporting plaintiffs). Under this interpretation, a university can no longer comply by "meet[ing] the

interests and abilities of women to *the same degree* as they meet the interests and abilities of men." OCR Manual, App. at 292a (emphasis added); Amicus Brief of the United States at 18.

B. Brown's Efforts to Provide Equal Opportunity to Male and Female Athletes

1. Brown University has been a national leader in providing collegiate opportunities for women. At the time of the trial in this case, 51.1% of the student body was female—one of the highest percentages of women in the Ivy League. And Brown was in the forefront of women's athletics with an "impressive history of program expansion" that began shortly after Brown became co-educational in 1971. *See Cohen* III, App. at 140a (emphasis deleted). Brown added 14 funded women's varsity teams to its program between 1971 and 1977, created a women's winter track team in 1982, and today offers many more sports for women than most universities in the United States. *Cohen* I, App. at 204a, 206a; 334a. There is no dispute, however, that the percentage of women participating in Brown's varsity athletic program did not mirror the percentage of women in its student body. The issue in this case is whether that statistical imbalance was the product of "discrimination" prohibited by Title IX. 20 U.S.C. § 1681.

2. The district court did not make any finding that Brown allocated athletic participation opportunities based on an animus towards women, and the record evidence confirmed that Brown attempted to design its sports selection in a way that would give interested men and women an equal chance to participate in varsity athletics. In determining what sports should be offered, Brown evaluated numerous factors, including "the number of high school students available who want to play," and the "interests and abilities of the student body." *See* App. at 334-35a. Under Brown's approach to program development—which did not use a numerical quota or seek to engineer the gender composition of its program—women would only have been likely to secure 51% of the varsity

opportunities if they had represented 51% of the group of interested athletes. They did not.

At trial, Brown presented overwhelming evidence that among prospective and current students interested in varsity athletic participation, men substantially outnumbered women, and the district court made no findings to the contrary. Defendants' expert, Dr. Finis Welch, "a prominent labor economist," *Cohen* III, App. at 125a, concluded that "men express greater interest in, and actually participate in, competitive sports to a much larger degree than do women." App. at 317a. Dr. Welch's conclusion was based on "an extensive search and review of large nationally representative data sources" which included, *inter alia*, a review of seven different surveys conducted by independent institutions concerning young men's and women's interest and participation in sports at the national level, *see id.*, App. at 320-27a, in addition to an extensive review and tabulation of data from the 65,829 applications received by Brown for the classes of 1994-1998 concerning applicants' interest in sports participation at Brown. *See* App. at 318.[4]

Brown's view that the gender ratio of the student body should not be used as a benchmark for equal opportunity in its athletic program can best be illustrated by a hypo-

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[4] Dr. Welch's survey showed that between 38 and 39 percent of the prospective applicants who sent College Board questionnaires to Brown indicating that they planned to participate in varsity sports were women. App. at 320a, 331a, 336a. Similarly, only 42 to 45 percent of the Brown applicants for the classes of 1994-1998 who expressed an interest in participating in sports were women. App. at 319a, 329a. Data from the 1993-94 Athletics Participation Survey by the National Federation of State High School Associations showed that in 1993-94, only 37.9% of participants in high school athletics (the pool from which Brown draws its athletes) were women. App. at 327a, 333a. In addition, the relative participation rate of men to women in the intramural program at Brown is eight to one, even though there is no limit on the number of students who can participate in these programs. App. at 334a. Men have also outnumbered women in Brown's club sports by a margin of three to one. App. at 335-36a.

thetical that demonstrates the effects of such a quota. The hypothetical assumes:

- The ratio of men to women in the student body is 50/50
- There are 160 varsity positions to be allocated
- There are 200 qualified applicants (interested and able athletes)
- 120 of the athletes are men (60%) and 80 are women (40%)

Basis For Allocation	Gender	Athletes Offered A Varsity Position	Dis-appointed Athletes	% Chance for Participation
Student Body Ratio	Men	80 (50% of 160)	40	67%
	Women	80 (50% of 160)	0	100%
Interest and Ability	Men	96 (60% of 160)	24	80%
	Women	64 (40% of 160)	16	80%

As this hypothetical illustrates, each individual, regardless of gender, has an equal chance of participating in varsity athletics if the interests of all qualified athletes are considered when the program is designed.[5] In contrast, an approach that allocates opportunities based on the ratio of the student body—a ratio that has no demonstrable relationship to athletic interest and ability—affords each woman a much higher chance of participation than

[5] An athletic program with single sex teams must take gender into account when opportunities are allocated through the selection of teams. The test of whether the selection mechanism is proper should depend upon whether the program affords men and women an equal chance to participate by responding to the interests of all athletes on a proportional basis. For example, in this hypothetical, if names of all the interested men and women athletes were drawn by lot, and teams were created based upon the lottery results, it is apparent that men would get a higher percentage of the athletic opportunities if more men than women entered the lottery.

each man. In this hypothetical, all interested women are accommodated, while 40 men are not, despite the fact that all the athletes are similarly situated.

3. In May 1991, Brown issued a university-wide directive to implement budget cuts. As part of that effort, Brown changed the status of two men's varsity teams (golf and water polo) and two women's varsity teams (gymnastics and volleyball) by requiring the teams to secure all of their funding from donors. The change affected 37 men and 23 women. *Cohen* I, App. at 206a.

C. Proceedings in the Courts Below

In 1991, members of the women's gymnastics and volleyball teams filed a class action alleging that Brown had discriminated against women athletes in violation of Title IX. The district court and the First Circuit approved the issuance of preliminary and permanent injunctive relief based upon the conclusion that Brown had not complied with the Policy Interpretation's three-part test.

1. After a 14-day evidentiary hearing, the district court granted a preliminary injunction that ordered Brown to restore university funding to the women's gymnastics and volleyball teams, and to continue funding all existing women's teams pending the outcome of the case. *Cohen* I, App. at 248-49a. The court held that a finding of discrimination can be based solely upon an institution's failure to meet the three-part test in the Policy Interpretation, and that plaintiffs were likely to prevail on their claim that Brown failed to meet any part of the test. *Id.*, App. at 227a. Brown appealed pursuant to 28 U.S.C. § 1292(a)(1). The First Circuit affirmed.

The Court of Appeals relied upon the Policy Interpretation to establish the evidentiary standard governing proof of a Title IX violation. *See Cohen* II, App. at 190a. The Court held that the first part of the test—the numerical quota—operates as a "safe harbor." *Id.*, App. at 181a. As a result, any university that "does not wish to engage in extensive compliance analysis may stay on the sunny side of Title IX simply by maintaining gender parity between its student body and its athletic lineup." *Id.* The

First Circuit also construed the second part of the test to use the same quota as a benchmark for compliance. The Court reasoned that institutions could achieve compliance under that part by "continually expanding athletic opportunities in an ongoing effort to meet the needs of the underrepresented gender" because "Title IX does not require that the university leap to complete gender parity in a single bound." *Id.* With respect to the third part, the First Circuit held that, "[i]f there is sufficient interest and ability among members of the statistically underrepresented gender, not slaked by existing programs, an institution necessarily fails this prong of the test." *Id.*, App. at 182a. The Court approved the second and third parts of the test as appropriate "prox[ies] for gender balance." *Id.*, App. at 181a.

The First Circuit rejected Brown's contention that it had not engaged in discrimination by allocating more than 50% of its varsity opportunities to men because men represented substantially more than half of the pool of interested and able athletes. The Court characterized that view as "myopic" because "[t]he fact that the overrepresented gender is less than fully accommodated will not, in and of itself, excuse a shortfall in the provision of opportunities for the underrepresented gender." *Id.*, App. at 184a. In addition, the First Circuit asserted that it would be difficult to determine the relative athletic interests of men and women. *Id.*, App. at 185-86a. The Court found it more expedient to adopt an irrebuttable presumption that "women, given the opportunity, will naturally participate in athletics in numbers equal to men." *Id.*, App. at 187a. It accordingly held that Title IX plaintiffs can meet their burden of proving discriminatory conduct through proof of a "numerical disparity, coupled with unmet interest," and that this proof can be rebutted only by evidence that the university continuously and "uninterruptedly" expanded women's athletic participation. *Id.*, App. at 190a, 198a.

Finally, the Court of Appeals concluded that the Policy Interpretation was consistent with Section 1681 because

it "draws its essence from the statute," and does not raise any serious constitutional questions. *Id.*, App. at 184-85a. The Court rejected Brown's argument that the statute could not require universities to accommodate women's athletic interests in preference to men's athletic interests without violating the Equal Protection Guarantee of the Fifth Amendment because "Congress has broad powers . . . to remedy past discrimination." *Id.*, App. at 187a.

2. After the conclusion of a 30-day bench trial in September of 1994, the district court determined that Brown had violated Title IX by failing to fund a sufficient number of sports for women. First, the district court found a "presumption" of discrimination because Brown's program did not satisfy the numerical quota established by the first part of the Policy Interpretation's test. *Cohen* III, App. at 86a, 126a. The district court reasoned that "substantial proportionality is properly found only where the institution's intercollegiate athletic program *mirrors* the student enrollment as closely as possible," in part because Brown "predetermines the . . . male to female ratio" of its athletic program. *Id.*, App. at 118-19a (emphasis added).[6] The court found that Brown's program did not "mirror" its student body at the time of trial based on its findings that 51.14% of the students were women, and 38.13% of the varsity athletes were women.[7] *Id.*, App. at 139a. Second, the court determined that Brown

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[6] The court's finding that Brown "predetermines" the gender ratio did not suggest that Brown had allocated its participation opportunities on the basis of a discriminatory animus. Instead, the court found that Brown's selection of teams and recruitment of the best athletes to play on them effectively determined student body participation ratios. *Cohen* III, App. at 120a.

[7] The district court declined to consider evidence that there were many unfilled participation opportunities on most of the women's teams. *Cohen* III, App. at 97-98a, 121-23a. Brown does not contend that an evaluation of all varsity opportunities would establish a 50/50 allocation between men and women, but the gender differential would have been smaller if the Court had considered all available "opportunities," instead of just participants, as required by 34 C.F.R. § 106.41(c).

could not satisfy part two of the test because "the percentage of women participating in Brown's varsity athletic program has remained remarkably steady" despite "an impressive history of program expansion" shortly after it became coeducational. *Id.*, App. at 140a (emphasis deleted). Finally, the court found that Brown had not satisfied the third part of the test because women on four unfunded teams—fencing, water-polo, skiing, and gymnastics—had "demonstrated the interest and ability" to compete at the varsity level. *Id.*, App. at 141-42a.[8]

The court accordingly found a violation of Title IX without making any findings concerning the gender composition of the pool of interested athletes. The court reiterated the First Circuit's view that Brown's interest-based approach to allocating participation opportunities "undermined the remedial purposes of Title IX by limiting required program expansion for the underrepresented sex." *Cohen* III, App. at 136a. Acknowledging that the concept of the "qualified applicant pool" (i.e., qualified men and women interested in intercollegiate athletics) is well-settled in Title VII jurisprudence, the court claimed that a determination of the interested and qualified pool of potential athletes would be "difficult to administer," and would impose an "insurmountable task for Title IX plaintiffs" because there "is no one measure" of "relative interests." *Id.*, App. at 135-36a.

The court ordered submission of a compliance plan within 120 days. *Id.*, App. at 147a. The district court then rejected Brown's plan and ordered Brown to "elevate and maintain women's gymnastics, women's water-polo, women's skiing, and women's fencing to university-funded

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[8] The district court also stated that Brown violated Title IX by affording women "unequal opportunities" because Brown funded more positions for men than women. *See Cohen* III, App. at 144-45a. Although the court characterized this as an "additional" ground, it is clear that this finding is also based on Brown's failure to meet the quota that is at the heart of this case. *Id.* The First Circuit did not rely on this finding as an alternate basis for affirmance.

status." *Id.*, App. at 163a, 165a.[9] In addition, Brown was enjoined from "eliminating or reducing in status any women's varsity team." *Id.*

3. On appeal pursuant to 28 U.S.C. § 1291, the First Circuit affirmed the district court's finding of liability with Chief Judge Torruella dissenting. (Brown's appeal was not heard by the same panel as the first appeal.) The terms of the district court's remedial order were reversed and remanded.

a. Although the Court considered the legal issues addressed in the preliminary injunction appeal to be law of the case, *Cohen* IV, App. at 4a, it nevertheless reviewed the prior analysis in detail, and confirmed its view that Title IX permits use of "gender parity" as a benchmark for measuring compliance because the focus of the statute is "not on the overrepresented gender, but on the underrepresented gender." *Id.*, App. at 33a. The Court again found that the concept of the qualified pool "has no place in a Title IX analysis of equal opportunities for male and female athletes," because this approach would "undermine[] the remedial purposes of Title IX by limiting required program expansion for the underrepresented sex to the status quo level of relative interest[]." *Id.*, App. at 30a, 37a. The Court emphasized that "even if it can be empirically demonstrated that, at a particular time, women have less interest in sports than do men, such evidence, standing alone, cannot justify providing fewer athletic opportunities for women than for men" because it assumed that women's lower level of interest in athletics is itself the product of "women's historical lack of opportunities to participate in sports." *Id.*, App. at 42a, 40a.

The First Circuit reversed the terms of the district court's remedial order based on considerations of academic freedom. *Id.*, App. at 59-60a. The district court exceeded its discretion in that respect by requiring Brown

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[9] Thus, the court ordered Brown to fund all viable varsity women's teams while numerous viable varsity men's teams remained unfunded. *See Cohen* III, App. at 138a n.52, 96a.

to fund additional teams instead of permitting it to pursue the "statutorily permissible proposal to comply . . . by cutting men's teams." *Id.*, App. at 54a.[10]

b. Chief Judge Torruella dissented. The dissent read Section 1681(b) to prohibit rules that require universities to afford interested women opportunities in preference to similarly-situated men in order to establish compliance with Title IX. *Id.*, App. at 75a, 80a. The Chief Judge concluded that "the three prong test," as the prior opinions interpreted it, did not represent a permissible interpretation of § 1681 because that test establishes "a quota" under all three parts. *Id.*, App. at 76a. The dissent explained that "[the first] prong surely requires statistical balancing" and "[i]t can hardly be denied that [the second] prong requires statistical balancing as it is essentially a test that requires the school to show that it is moving in the direction of satisfying the first prong." *Id.*, App. at 78a. And the third prong did not change the nature of the test because "a quota with an exception for situations in which there are insufficient interested students to allow the school to meet it remains a quota." *Id.*, App. at 79a.

The dissent agreed with Brown's contention that the relative interests of men and women had to be evaluated in assessing issues of discrimination and equal opportunity. Otherwise, where "the rate of interest in athletics diverges between men and women at any institution, the district court's interpretation would require the institution to treat an individual male student's athletic interest and an individual female student's athletic interest completely differently: one student's reasonable interest would have to be met, *by law*, while meeting the other student's interest would only aggravate the lack of proportionality giving rise to the legal duty." *Id.*, App. at 77a. The dissent concluded that Section 1681 did not "require[]

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[10] The Court remanded the case for further proceedings on the remedy. Those proceedings have no bearing on the issues presented here, however, because Brown only seeks review of the lower courts' interpretation of the standards governing liability under Title IX, and liability has been finally resolved by the First Circuit.

Brown to allocate its athletic resources to meet the as-yet-unmet interest of a member of the underrepresented sex, women in this case, while simultaneously neglecting any unmet interest among individuals of the overrepresented sex." *Id.* Chief Judge Torruella found that his interpretation of Section 1681 was further required by the "serious constitutional difficulties" raised by the majority's interpretation. *Id.*, App. at 81a. He underscored the fact that there had been absolutely no findings by Congress with respect to discrimination against women in athletics when Title IX was passed, and no "exceedingly persuasive justification" for preferences had been advanced. *Id.*, App. at 80a.

REASONS FOR GRANTING THE WRIT

Title IX, like the constitutional guarantee of equal protection, embodies the "widely cherished American ethic" of "[f]airness in individual competition for opportunities." *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 319 (1978) (opinion of Powell, J.) (construing Title VI and the Equal Protection Clause). Brown's athletic program, which provides all interested and able athletes, whether male or female, an equal chance to secure a place in its varsity program honors that ethic. The First Circuit nevertheless held that Brown violated Title IX through adherence to these gender-neutral principles because its program did not achieve "gender parity between its student body and its athletic lineup," *Cohen* II, App. at 181a, did not "march uninterruptedly" towards that goal, *id.*, App. at 198a, and did not fund positions for every qualified woman in the student body interested in competing on a viable team. *Id.*, App. at 182a.

Under the First Circuit's interpretation of Title IX, Brown had no choice but to set aside up to 51% of its varsity opportunities for qualified women because 51% of its students were women. That stark numerical quota was required without regard to the fact that women do not represent 51% of all interested athletes, because any differences in the athletic interests of men and women were deemed attributable to "socialization and disparate

opportunities." *Id.*, App. at 187a. Following the First Circuit's lead, the other circuits to consider the issue have similarly concluded that Title IX *requires* colleges to assign coveted athletic opportunities to qualified women on this same preferential basis.[11]

This Court should grant review of the First Circuit's decision for two reasons. First, the decision of the Court of Appeals conflicts with this Court's precedents. The First Circuit committed virtually every error that this Court has warned against when interpreting the same statutory wording at issue here in the context of Title VII. The Court of Appeals allowed an inference of discrimination based on a statistical comparison with the student body, instead of the qualified pool of athletes seeking to play varsity sports. It refused to consider evidence that the statistical disparity it found was the product of differences in men's and women's relative interest in sports, for which Brown has no legal responsibility. It adopted a "safe harbor" that encourages universities to adopt numerical quotas and set aside policies to "stay on the sunny side of Title IX." *Cohen* II, App. at 181a. It adopted evidentiary standards governing proof of liability that compel universities to institute mandatory quotas and other preferential treatment expressly forbidden by Section 1681(b). And it read the Equal Protection Guaran-

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[11] *Roberts v. Colorado State Univ.*, 998 F.2d 824 (10th Cir.), *cert. denied*, 510 U.S. 1004 (1993) (agreeing with *Cohen* II that women's lower level of interest in sports participation is not relevant to proof of discrimination); *Horner v. Kentucky High School Athletics Ass'n*, 43 F.3d 265, 275 n.9 (6th Cir. 1994) (citing *Cohen* II with approval and holding that "an institution [cannot] allocate athletic opportunities to women in accordance with the ratio of interested and able women to interested and able men"); *Favia v. Indiana Univ. of Pennsylvania*, 7 F.3d 332, 343-44 (3d Cir. 1993) ("schools must either provide athletic opportunities in proportion to gender composition of student body or fully accommodate interested athletes among under-represented sex"). *See also Kelley v. Bd. of Trustees of the Univ. of Illinois*, 35 F.2d 265, 270 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 938 (1995) (citing *Cohen* interpretation as a justification for voluntary preferences for treatment of women athletes).

tee of the Constitution to be unconcerned about the fact that universities will have to deny male athletes an equal chance to participate in varsity sports based on the unsupported assumption that Congress found that quotas and set asides were needed to redress societal discrimination against women.

Second, the use of Title IX to mandate adherence to preferential quotas presents an issue of exceptional importance that warrants resolution now. Most of the varsity athletic programs in the country must be dramatically altered to increase the percentage of women in order to comply with the standard at issue here. Universities with budgetary constraints must cut academic offerings to fund additional teams for women, cut teams for men, or risk liability for damages and loss of federal funds. In light of the uniform position of the circuits and the federal agency responsible for enforcement, intervention by this Court is needed to prevent compulsory displacement of nondiscriminatory programs that offer equal opportunity to all students with preferential programs that guarantee "gender parity." *Id.*

I. THE DECISION OF THE FIRST CIRCUIT CONFLICTS WITH THIS COURT'S PRECEDENTS

A. The First Circuit Disregarded This Court's Holdings That An Inference Of Discrimination Can Only Be Predicated On A Statistical Comparison With A Pool Of Interested And Qualified Candidates

Title IX prohibits "discrimination" against students, whether male or female, "on the basis of sex." 20 U.S.C. § 1681(a). In this case, the lower courts found that Brown engaged in unlawful "discrimination" based on a presumption derived from statistical proof that the percentage of women in its student body exceeded the percentage of women in its athletic program. One would think that Brown's tremendous success in attracting women to its student body would suggest the absence of discriminatory policies. But here, that was the very evidence that was used to supply "proof" that Brown's athletic program

was discriminatory.[12] And the Court refused to consider overwhelming evidence indicating that the disparity was attributable to the fact that there are many fewer women than men who want to participate in varsity athletics, finding that such evidence was "irrelevant" and ridiculing Brown's view of its relevance to proof of discrimination as "myopic." *Cohen II*, App. at 184a. Even if Brown could fill 51% of its athletic program with qualified women, by preferring interested women over interested men, gender-blind policies would not produce that result in the real world where men and women—for a variety of reasons unrelated to Brown's conduct—do not share an equal interest in varsity competition. *See supra* at 7-8. There was accordingly no basis whatsoever to support a finding of "discrimination," 20 U.S.C. § 1681(a), or a denial of "equal opportunity," 34 C.F.R. § 106.41(c), based on the statistical proof used by the courts below.[13]

The First Circuit's reliance on this statistical evidence to establish proof of discrimination is irreconcilable with this Court's decision in *Wards Cove v. Atonio*, 490 U.S. 642 (1989). Title VII prohibits "discrimination," like

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[12] The First Circuit ignored Brown's contention that Title IX required proof of discriminatory intent. Brief of Appellants dated December 11, 1995, refiled March 5, 1996. In *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 75 n.8 (1992), this Court held that proof of intent is required for damage claims under Title IX, but did not resolve the question whether such proof is also required for claims seeking equitable relief. If this Court were to grant review, Brown would present that issue, which was properly preserved below, as an additional ground for reversal.

[13] The First Circuit's test conflicts with the text of the regulation, which emphasizes the need to consider whether the university's program "effectively accommodate[s] the *interests and abilities of members of both sexes.*" 34 C.F.R. § 106.41(c)(1) (emphasis added). The language of the Policy Interpretation also did not require the course chosen by the lower courts. To the extent it did, however, it would not be entitled to any deference. *See, e.g., Stinson v. United States*, 503 U.S. 36, 45 (1993) (deference not required where the interpretation is inconsistent with the statute, the Constitution, or a regulation).

Title IX, "on the basis of sex." 42 U.S.C. § 2000e-2(a). In *Wards Cove*, the court of appeals upheld a finding of "discrimination" under Title VII based upon evidence that the percentage of non-white workers filling unskilled positions in an employer's cannery operations was substantially higher than the percentage of non-white workers filling unskilled positions in the employer's non-cannery operations. *Id.* at 649-50. This Court reversed, finding that the Court of Appeals "fundamentally misconceived the role of statistics," because the statistical imbalance identified by the court of appeals could have been attributable to differing levels of interest between the groups instead of discriminatory barriers. *Id.* at 650 & n.5, 654.

This Court explained that statistical proof of discrimination in an employer's workforce must be based on a comparison with the racial composition of the pool of qualified *applicants*—those individuals who are willing and able to compete for the opportunities at issue. *Id.* at 652-54.[14] The "pool of cannery workers" could not be used as a "surrogate for the class of qualified job applicants" because "it contains many persons who have not (and would not) be noncannery job applicants." *Id.* at 654. *See also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989) (emphasizing that an "inference of discriminatory exclusion" can only be made where there is "a significant statistical disparity" between the "number of qualified minority contractors *willing and able* to perform a particular service and the number of such contractors actually engaged [in that service]") (emphasis added). This Court emphasized in *Wards Cove* that a "selection mechanism" that awarded opportunities to non-white employees proportional to their interest in those

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[14] The Civil Rights Act of 1991 altered certain terms of Title VII after *Wards Cove* that are not relevant here. Congress made no changes to *Wards Cove's* reliance on a qualified pool for disparate impact analysis under Title VII. *See* H.R. Report No. 102-40(1), 102nd Congress, 1st Sess. (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 571.

opportunities was probably *not* discriminatory. 490 U.S. at 653.

The First Circuit, however, did not follow this Court's clear guidance, and committed precisely the same error as the court of appeals in *Wards Cove*. The First Circuit insisted that the relevant population for comparative purposes was the entire student body, even though this group unquestionably "contains many persons who have not (and would not) be . . . applicants" for varsity opportunities. *Wards Cove*, 490 U.S. at 654. By adherence to this analysis, the court impermissibly used a gender "imbalance" in one "segment" of the university's programs to establish a presumption of discrimination. *Id.* at 653. And it further compounded its error by refusing to permit Brown to rebut that presumption through evidence which established that the gender ratio of "selected applicants" for Brown's athletic program "is not significantly less" than the gender ratio of "qualified applicants"—the very evidence that this Court said was strongly probative of a nondiscriminatory "selection mechanism." *Id.* at 653. There was accordingly no basis for the First Circuit's conclusion that an "empirical[] demonstrat[ion] that . . . women have less interest in sports" could not "justify providing fewer athletics opportunities for women than for men," because that is the natural and permissible result of equal opportunity as defined by this Court in *Wards Cove*. *Cohen* IV, App. at 42a.

B. The First Circuit's Conclusion That Section 1681 Obligates Universities To Afford Preferential Treatment To Women Conflicts With This Court's Interpretation Of The Same Language In Title VII

In Title IX, Congress directed universities receiving federal funds to eliminate "discrimination" in their programs, but it did not direct them to achieve gender balance in those programs, or to ensure that interested women would have a greater chance of participating in varsity athletics than interested men. Section 1681(b) could not be more explicit on this issue, as it tells courts that "*noth-*

ing" in the language of Section 1681(a) "shall be interpreted" to "require" any institution to "grant preferential or disparate treatment to the members of one sex" to rectify "an imbalance." 20 U.S.C. § 1681(b) (emphasis added). The evidentiary standards adopted by the First Circuit, however, conflict with the clear command of that language and this Court's Title VII precedents.

First, the Court of Appeals read this language to permit the use of a quota as a "safe harbor" that would prevent imposition of liability. *Cohen* II, App. at 181a. The Court emphasized that this rule afforded universities an easy way to "stay on the sunny side of Title IX" because they could simply implement a quota that achieves "gender parity" with its student body. *Id.* This Court, however, has already read the same language in Section 703(j) of Title VII, 42 U.S.C. 2000e-2(j), to prohibit the adoption of evidentiary standards that encourage defendants to institute quotas on a voluntary basis.[15] *Wards Cove*, 490 U.S. at 652 (rejecting reliance on statistical proof that would make quotas the only "practicable option" for defendants). *See also Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 993-94 (1988) (plurality opinion) (adoption of legal rules that encourage the use of quotas to avoid expensive litigation would be "contrary to Congress' clearly expressed intent" in Section 703(j)).

Second, the First Circuit's rule does not merely encourage the imposition of preferential quotas, as Chief Judge Torruella persuasively explained, it requires it. *Cohen* IV, App. at 78-79a. Compelling Brown to reserve up to 51% of its athletic opportunities for some 40% of the pool of qualified candidates—the goal Brown must ultimately meet to escape liability under the First Circuit's interpretation—is surely "preferential . . . treatment" to eliminate an "imbalance" within the ordinary meaning of Section 1681(b). *See, e.g., Wards Cove*, 490 U.S. at 653 (an evidentiary standard that infers discrimination based on

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[15] As set forth in n.1 *supra*, Section 1681(b) was patterned after Section 703(j) of Title VII.

a statistical comparison with a pool that includes persons who are not interested in the opportunities leads to preferential treatment); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981) (evidentiary rule that presumes discrimination when an employer hires a male instead of an equally qualified female compels preferential treatment barred by Section 703(j)). *See also Croson*, 488 U.S. at 493 (a set aside "denies certain citizens the opportunity to compete for a fixed percentage").[16] Yet this Court has repeatedly and emphatically confirmed, when construing the same words in Section 703(j) of Title VII, that Congress "strongly opposed" the use of "quotas or preferences" to "maintain [gender] balance," and that the failure to make decisions with reference to such measures does not provide a basis for liability. *Sheet Metal Workers Int'l Ass'n v. EEOC*, 478 U.S. 421, 463 (1986) (Title VII does not "require an employer . . . to adopt quotas or preferences simply because of a racial imbalance"); *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 340, 375 n.60 (1977) (Section 703(j) "makes clear that Title VII imposes no requirement that a work force mirror the general population" and "does not require an employer to grant preferential treatment" to "rectify an imbalance"); *Burdine*, 450 U.S. at 259 (Section 703(j) demonstrates that Title VII does not "demand that an employer give preferential treatment to minorities or women").

The First Circuit was required to follow those precedents here. *See, e.g., Oscar Mayer & Co. v. Evans*, 441

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[16] The First Circuit asserts that its rule does not establish an impermissible "quota" because a university would not be liable if the number of qualified women athletes in the student body is insufficient to attain "gender parity." *Cohen II*, App. at 181a. A similar argument was rejected in *Bakke* because a program that *reserves* a number of positions for any qualified candidates on the basis of race denies equal opportunity, whether called a quota or some other name. 438 U.S. at 289 (Opinion of Powell, J.). In addition, universities cannot avoid preferential treatment by accommodating the interests of all male and female athletes, because few, if any, universities have the funds or facilities to do that.

U.S. 750, 754, 756 (1979) (relying on Title VII precedent to construe section of ADEA that was "patterned after and is virtually in *haec verba*" with section of Title VII). It nevertheless sought to justify a divergent interpretation of Section 1681 because gender has to be taken into account when creating single sex teams, and courts "must have some way of determining whether an institution complies with the mandate of Title IX." *Cohen* IV, App. at 38a. But Congress obviously did not countenance the imposition of mandatory quotas or other preferences "as a way of determining" whether universities were discriminating, and it did not exclude athletics from the dictates of Section 1681(b). In addition, the central inquiry in ferreting out discrimination should not be whether gender was considered—as here there is a legitimate reason to do so—but whether "legitimate . . . principles were subordinated to [gender]" when the operative decisions were made. *Cf. Bush v. Vera,* 116 S. Ct. 1941, 1951 (1996) (plurality opinion). Under the First Circuit's rule, however, efforts to accommodate the interests of all members of the qualified pool—a "legitimate principle" of program design—must be "subordinated to [gender]" in an effort to reach an arbitrary quota. *Id.*

In the end, the Court of Appeals seeks to justify its rule based upon the view that women's relative lack of interest in sports should not "become the instrument of further discrimination against the underrepresented gender." *Cohen IV,* App. at 42a. But there is no evidence whatsoever that Congress determined that preferences are needed to eliminate barriers to equal opportunity, and the text of the Act leaves no doubt that Congress decided not to mandate such a remedy. Women's participation in athletics has increased dramatically without the First Circuit's rule, and the fact that women are not equally interested in devoting their time and energies to collegiate athletics may be the product of legitimate choice instead of discriminatory barriers. *See, e.g., Croson,* 488 U.S. at 503 (finding that the "dearth of minority participation"

in the construction industry could be explained by "past societal discrimination" as well as "entrepreneurial choices"). Just as there is no reason to presume that men would enroll in collegiate dance programs in equal numbers to women in the absence of discriminatory barriers, there is no reason to presume an equal interest in athletics when the evidence shows otherwise. Title IX was designed to guarantee equal opportunity—not equal participation—and the First Circuit's failure to follow the dictates of Section 1681(b) and this Court's precedents warrants review by this Court.

C. The First Circuit's Conclusion That Congress Could Permissibly Require Universities To Establish Quotas To Remedy Perceived Societal Discrimination Against Women Conflicts With This Court's Precedents Interpreting The Equal Protection Guarantee Of The Constitution

As this Court has frequently held, federal courts must interpret statutes in a manner that avoids serious constitutional questions. *See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council,* 485 U.S. 568, 575 (1988). In clear disregard of that principle, the First Circuit chose an interpretation of Section 1681 that presents serious constitutional questions under circumstances where the plain meaning of that section poses no constitutional problems whatsoever. In addition, the First Circuit's conclusion that Congress could constitutionally require universities to apportion athletic opportunities based upon a "gender classification slanted . . . in favor of women" because it has "broad powers under the Fifth Amendment to remedy past discrimination" conflicts with this Court's precedents. *Cohen* II, App. at 187a.[17]

The First Circuit failed to adhere to the standard established by this Court in *Mississippi Univ. for Women v. Hogan,* 458 U.S. 718 (1982). *See also United States*

[17] This Court reserved the question whether Congress in fact relied upon its powers to remedy past discrimination in enacting Title IX. *See Franklin,* 503 U.S. at 75 n.8.

v. Virginia, 116 S. Ct. 2264 (1996). In *Hogan*, this Court held that Mississippi violated the Equal Protection Clause of the Constitution because a "searching analysis" revealed no "exceedingly persuasive justification" for an admissions policy that denied men the opportunity to compete for admission to a state nursing school. 458 U.S. at 724, 728. In this case, the Court did not conduct a "searching inquiry" to determine whether Congress had made any findings of past discrimination that would supply an exceedingly persuasive justification for the imposition of mandatory quotas or set asides that deny male athletes an equal opportunity to participate in collegiate sports. *Id.* at 728. Instead, the First Circuit thought it sufficient that "much testimony was heard with respect to discrimination against women in higher education" prior to the passage of Title IX. *Cohen* II, App. at 188a (quoting H.R. Rep. No. 554, 92nd Cong., 2nd Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 2462, 2511). That does not constitute an "exceedingly persuasive justification" under this Court's precedents.

First, this Court emphasized in *Hogan* that a "compensatory purpose" is not sufficient to "justify an otherwise discriminatory classification" unless "members of the gender benefited by the classification actually suffer a disadvantage related to the classification." 458 U.S. at 728. That standard was not satisfied in *Hogan* because the women who received the benefits of the classification—those who obtained admission to nursing school in preference to men—had not been "deprived of . . . opportunities" to "obtain training in the field of nursing." *Id.* at 729. Similarly, in *Orr v. Orr*, 440 U.S. 268 (1979), this Court found that a state law that denied alimony to men could not be upheld as a remedy for economic discrimination against women, because the beneficiaries included women who had achieved financial success despite societal discrimination. *Id.* at 282-83. As in *Hogan*, this Court found that "a gender-based classification which . . . generates additional benefits only for those it has no reason to prefer cannot survive equal protection scrutiny." *Id.*

The classification at issue fails for the same reason. The Court of Appeals asserted that societal discrimination had dampened women's interest in athletics. *See Cohen* II, App. at 187a. But the direct beneficiaries of the preference it divined from Section 1681 are women who already have the interest, ability, and training necessary to compete in varsity sports at the collegiate level. *Cohen* III, App. at 138a n.52; 163a; 165a (limiting relief to those women with demonstrated ability to compete at the varsity level). These women, like the women who stood to benefit in *Orr*, managed to become accomplished athletes despite any societal discrimination, and there is accordingly no "exceedingly persuasive justification" to afford them an opportunity to compete in varsity athletics in preference to similarly situated men.[18]

Second, this Court has declined to interpret the Equal Protection Clause in a manner that "denies certain citizens the opportunity to compete" for the full universe of opportunities provided by a program based on a "generalized assertion that there has been past discrimination" in society that may have contributed to a statistical imbalance. *See Croson*, 488 U.S. at 493, 498. *See also Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 274 (1986) (reversing decision upholding a layoff policy that gave minorities a preference to "alleviate the effects of societal discrimination"); *Bakke*, 438 U.S. at 307. As this Court found in *Croson*, there is no compelling interest for "apportioning . . . opportunities on the basis of race"

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[18] In contrast, the benefits bestowed on women in *Califano v. Webster*, 430 U.S. 313, 318 (1977), one of the two cases relied upon by the First Circuit, *see Cohen* II, App. at 187a, worked "directly to remedy" economic discrimination that had been suffered by the beneficiaries throughout their working career by affording them a more favorable basis for calculating retirement income at the end of their career. The First Circuit's reliance on *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 566 (1990), also does not support its conclusion because the minority preferences at issue there were designed to serve the interests of listeners by promoting viewpoint diversity in programming and not to "remedy past discrimination." *See Cohen* II, App. at 187a.

because "race should be irrelevant to personal opportunity and achievement," and it would contravene the purposes of a "constitutional provision whose central command is equality" to give "shifting preferences based on inherently unmeasurable claims of past wrongs." 488 U.S. at 505-06.

Gender classifications do not have to be supported by a "compelling interest." *Id.* But this Court's precedents leave no room for doubt that there is no "exceedingly persuasive justification," *Hogan*, 458 U.S. at 724, for compelling universities to "apportion[] [athletic] opportunities on the basis of [gender]" to redress "inherently unmeasureable claims of past wrongs." *Croson*, 488 U.S. at 505-06. *See also Johnson v. Transp. Agency*, 480 U.S. 616, 638, 630 n.8 (1987) (upholding a public employer's decision to rectify an extreme gender imbalance through voluntary hiring preferences because, *inter alia*, gender was just "one of numerous factors [taken] into account" and there is a "fundamental difference between volitional private behavior and the exercise of coercion by the State").

II. THE PETITION PRESENTS ISSUES OF EXCEPTIONAL IMPORTANCE THAT WARRANT RESOLUTION BY THE COURT AT THIS TIME

A. Compliance With The Affirmative Action Obligations Imposed By The Prevailing Interpretation Of Title IX Will Have A Profound And Detrimental Impact On Programs At Virtually Every University In America

This case does not concern the Title IX problems of one university in Rhode Island. The issues presented here have wide-ranging impact on countless colleges across America. As the First Circuit acknowledged, it is "unlikely" that many athletic programs at coeducational universities "reflect the gender balance of their student bodies." *Cohen* II, App. at 182a. *See also infra* at n.19. Virtually every institution in the country must now do what Brown has been ordered to do: find the funds neces-

sary to continue expanding women's teams, or eliminate opportunities for men. Failure to restructure athletic programs in an effort to achieve gender parity exposes virtually all academic institutions to expensive litigation, liability, and the loss of federal funding.

Nor does this case simply concern unwarranted regulatory intrusion into the affairs of academic institutions. The rule of law that has been imposed also undermines the congressional intent to protect the "overrepresented" gender from the competitive consequences of mandatory preferences. As stated by the plurality in *Watson*, it is "perverse" to have "quotas and preferential treatment become the only . . . means of avoiding expensive litigation and potentially catastrophic liability" when Congress "clearly and emphatically expressed its intent" to prohibit compelled preferences. 487 U.S. at 993.

There is also no need to speculate whether this rule will have that impact. The press has already been filled with reports of colleges and universities cutting men's varsity programs to meet the requirements of this misguided interpretation of Title IX. As one article reported last year, UCLA discontinued its men's swimming and diving team, which had produced 22 Olympic medalists, including 13 golds. *See* Jessica Gavora, *Quota System Hurts Team*, USA Today, July 23, 1996, at 14A.[19] Universities

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[19] *See also* Mary Jordan, *Only One School Meets Gender Equity Goal*, The Washington Post, June 21, 1992 at D1; David Barron, The Houston Chron., June 29, 1993, at 1 (men's basketball program eliminated to make way for women's softball); Billy Packer, *Quota System Would Benefit Women, Hurt Black Male Athletes*, USA Today, July 2, 1993, at 12C; Bill Jauss, *NU Adds Varsity Women's Soccer; Men's Fencing Clubbed*, Chicago Trib., Aug. 9, 1993, at 11; Sean Waters, L.A. Times, June 2, 1994, at 22 (Santa Monica College dropped men's volleyball and tennis teams and added women's soccer); Michael Mayo, Ft. Lauderdale Sun-Sentinel, Dec. 11, 1994, at 16C (Pro golfer Woody Austin played golf at the University of Miami before the men's program was cut); John Maher, *Out of the Running*, Austin American-Statesman, Jan. 22, 1995, at A1 (Blinn

that dismantle men's athletic programs to comply with the standards at issue cannot simply turn back the clock when those standards are later found to conflict with Title IX. It takes years to build a successful program, and those programs should not be sacrificed to the impermissible affirmative action mandate of the lower courts.

B. This Court Should Not Postpone Review Pending Further Consideration By The Courts Of Appeals

Many circuits have not had an opportunity to consider the questions at issue in this case. Under the circumstances presented, however, there is no reason for this Court to await further review by the lower courts.[20] First, there is essentially no prospect that the erroneous rule of law adopted by the First Circuit will be abandoned without intervention by this Court. Even if another circuit decides the issue correctly, there is no reason to believe that the First Circuit would change the views it reached in two voluminous opinions after full briefing of the issues. In addition, OCR's decision to adopt and enforce the views of the *Cohen* courts in its Clarification Memo-

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College dropped world-renowned men's track program which produced 11 Olympians and a gold medal winner at the 1992 games); Wendy Parker, *Non-Revenue Sports—Quickest Way to Comply? Just Ax the Men's Teams*, The Atlanta Jrnl. and Constitution, May 7, 1995, at 9E (Univ. of Pittsburgh to drop men's gymnastics and tennis and add women's soccer to improve its numbers . . . at least 14 college wrestling programs have been cut just this year); Camille Paglia, *"Men's Sports Vanishing [as] Schools Drop Programs to Meet Equity for Women,"* USA Today, April 9, 1996, at 11A (over 100 men's wrestling programs have been terminated; men's gymnastics has been virtually annihilated).

[20] This Court has previously exercised its discretion to review analogous issues of exceptional importance to universities, and the public at large, even in the apparent absence of a conflict in the lower courts. *See, e.g., Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979) (availability of implied right of action under Title IX); *Hogan*, 458 U.S. at 718 (constitutionality of an admissions preference favoring women).

randum of last year further diminishes the prospect that the courts of appeals will eventually abandon the *Cohen* interpretation.

Second, it is unlikely that future cases would present a better record for consideration of these important questions. Brown submitted extensive evidence concerning the allocation of athletic opportunities, and preserved the legal arguments appropriate for this Court's consideration. Both sides of the issues were examined thoroughly in the two *Cohen* opinions and the dissent of Chief Judge Torruella. If this Court denies review here, there is in fact a risk that other universities may be reluctant to litigate the issues in light of the expense, the precedential force of the *Cohen* opinions, and the threat of enforcement actions posed by the OCR interpretation. There is accordingly no benefit to postponing review now.[21] And the harm caused by permitting the lower courts' distortion of Title IX to stand is both substantial and irreparable.

CONCLUSION

For the reasons set forth, the petition for certiorari should be granted.

---

[21] This Court's decision to deny certiorari in *Roberts*, 510 U.S. at 1004, does not suggest that the same course is appropriate here. The petition in *Roberts* only presented the question whether proof of intentional discrimination is required under Title IX, and did not seek review of the court of appeal's interpretation of § 1681(b) or the Equal Protection Guarantee of the Constitution. *See* Petition for Writ of Certiorari, No. 93-559 at i. The *Roberts* decision also relied upon *Cohen* II, which was issued in the context of a preliminary injunction, and could have been revisited at the conclusion of the case. Finally, the United States did not appear as an amicus in *Roberts*, and did not adopt its Clarification Memorandum endorsing the *Cohen* II view until 1996. The decision in *Kelley v. Bd. of Trustees of the Univ. of Illinois*, 35 F.3d 265 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 938 (1995), concerned a challenge to a university's voluntary decision to eliminate the men's swimming program, and accordingly did not present the question whether preferences can be mandated under Section 1681.

Respectfully submitted,

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No. ——

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

BROWN UNIVERSITY, *et al.*,
Petitioners,

v.

AMY COHEN, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 95-2205

AMY COHEN, *et al.*,
Plaintiffs-Appellees,
v.
BROWN UNIVERSITY, *et al.*,
Defendants-Appellants.

Appeal from the United States District Court
for the District of Rhode Island
[Hon. Raymond J. Pettine, *Senior U.S. District Judge*]

Before

Torruella, *Chief Judge*,
Bownes, *Senior Circuit Judge*,
and Stahl, *Circuit Judge*.

November 21, 1996

BOWNES, *Senior Circuit Judge*. This is a class action lawsuit charging Brown University, its president, and its athletics director (collectively "Brown") with discrimina-

tion against women in the operation of its intercollegiate athletics program, in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 ("Title IX"), and its implementing regulations, 34 C.F.R. §§ 106.1-106.71. The plaintiff class comprises all present, future, and potential Brown University women students who participate, seek to participate, and/or are deterred from participating in intercollegiate athletics funded by Brown.

This suit was initiated in response to the demotion in May 1991 of Brown's women's gymnastics and volleyball teams from university-funded varsity status to donor-funded varsity status. Contemporaneously, Brown demoted two men's teams, water polo and golf, from university-funded to donor-funded varsity status. As a consequence of these demotions, all four teams lost, not only their university funding, but most of the support and privileges that accompany university-funded varsity status at Brown.

Prior to the trial on the merits that gave rise to this appeal, the district court granted plaintiffs' motion for class certification and denied defendants' motion to dismiss. Subsequently, after hearing fourteen days of testimony, the district court granted plaintiffs' motion for a preliminary injunction, ordering, *inter alia*, that the women's gymnastics and volleyball teams be reinstated to university-funded varsity status, and prohibiting Brown from eliminating or reducing the status or funding of any existing women's intercollegiate varsity team until the case was resolved on the merits. *Cohen* v. *Brown Univ.*, 809 F. Supp. 978, 1001 (D.R.I. 1992) ("*Cohen I*"). A panel of this court affirmed the district court's decision granting a preliminary injunction to the plaintiffs. *Cohen* v. *Brown Univ.*, 991 F.2d 888, 907 (1st Cir. 1993) ("*Cohen II*"). In so doing, we upheld the district court's analysis and ruled that an institution violates Title IX if it ineffectively accommodates its students' interests and

abilities in athletics under 34 C.F.R. § 106.41(c)(1) (1995), regardless of its performance with respect to other Title IX areas. *Id.* at 897.

On remand, the district court determined after a lengthy bench trial that Brown's intercollegiate athletics program violates Title IX and its supporting regulations. *Cohen* v. *Brown Univ.*, 879 F. Supp. 185, 214 (D.R.I. 1995) ("*Cohen III*"). The district court ordered Brown to submit within 120 days a comprehensive plan for complying with Title IX, but stayed that portion of the order pending appeal. *Id.* The district court subsequently issued a modified order, requiring Borwn to submit a compliance plan within 60 days. Modified Order of May 4, 1995. This action was taken to ensure that the Order was "final" for purposes of this court's jurisdiction, and to expedite the appeal process. *Id.* Finding that Brown's proposed compliance plan was not comprehensive and that it failed to comply with the opinion and order of *Cohen III*, the district court rejected the plan and ordered in its place specific relief consistent with Brown's stated objectives in formulating the plan. Order of August 17, 1995 at 11. The court's remedial order required Brown to elevate and maintain at university-funded varsity status the women's gymnastics, fencing, skiing, and water polo teams. *Id.* at 12. The district court's decision to fashion specific relief was made, in part, to avoid protracted litigation over the compliance plan and to expedite the appeal on the issue of liability. *Id.* at 11. The district court entered final judgment on September 1, 1995, and on September 27, 1995, denied Brown's motion for additional findings of fact and to amend the judgment. This appeal followed.

Brown claims error in certain evidentiary rulings made during the trial and in the district court's order of specific relief in place of Brown's proposed compliance plan. In addition, and as in the previous appeal, Brown challenges on constitutional and statutory grounds the test employed

by the district court in determining whether Brown's intercollegiate athletics program complies with Title IX. In the first appeal, a panel of this court elucidated the applicable legal framework, upholding the substance of the district court's interpretation and application of the law in granting plaintiffs' motion for a preliminary injunction,[1] and rejecting essentially the same legal arguments Brown makes here.

Brown contends that we are free to disregard the prior panel's explication of the law in *Cohen II*. Brown's efforts to circumvent the controlling effect of *Cohen II* are unavailing, however, because, under the law of the case doctrine, we are bound in this appeal, as was the district court on remand, by the prior panel's rulings of law. While we acknowledge that the law of the case doctrine is subject to exceptions, we conclude that none applies here, and that the decision rendered by the prior panel in the first appeal is not, as Brown claims, "legally defective." Accordingly, we decline Brown's invitation to undertake plenary review of issues decided in the previous appeal and treat *Cohen II* as controlling authority, dispositive of the core issues raised here.

We find no error in the district court's factual findings or in its interpretation and application of the law in determining that Brown violated Title IX in the operation of its intercollegiate athletics program. We therefore affirm in all respects the district court's analysis and rulings on the issue of liability. We do, however, find error in the district court's award of specific relief and therefore remand the case to the district court for reconsideration of the remedy in light of this opinion.

---

[1] The prior panel upheld the district court's rulings in all respects save one. We held that the district court erred in placing upon Brown the burden of proof under prong three of the three-part test used to determine whether an intercollegiate athletics program complies with Title IX, discussed *infra*. *Cohen II*, 991 F.2d at 903.

I.

The relevant facts, legal principles, and procedural history of this case have been set forth in exhaustive detail in the previous opinions issued in this case. Thus, we recite the facts as supportably found by the district court in the course of the bench trial on the merits in a somewhat abbreviated fashion.

As a Division I institution within the National Collegiate Athletic Association ("NCAA") with respect to all sports but football, Brown participates at the highest level of NCAA competition.[2] *Cohen III*, 879 F. Supp. at 188. Brown operates a two-tiered intercollegiate athletics program with respect to funding: although Brown provides the financial resources required to maintain its university-funded varsity teams, donor-funded varsity athletes must themselves raise the funds necessary to support their teams through private donations. *Id.* at 189. The district court noted that the four demoted teams were eligible for NCAA competition, provided that they were able to raise the funds necessary to maintain a sufficient level of competitiveness, and provided that they continued to comply with NCAA requirements. *Id.* at 189 n.6. The court found, however, that it is difficult for donor-funded varsity athletes to maintain a level of competitiveness commensurate with their abilities and that these athletes operate at a competitive disadvantage in comparison to university-funded varsity athletes. *Id.* at 189. For example, the district court found that some schools are reluctant to include donor-funded teams in their varsity schedules[3] and that donor-funded teams are unable to obtain varsity-level coaching, recruits, and funds for

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[2] Brown's football team competes in Division I-AA, the second highest level of NCAA competition. *Cohen III*, 879 F. Supp. at 188 n.4.

[3] Two schools declined to include Brown in future varsity schedules when women's volleyball was demoted to donor-funded status. *Cohen II*, 991 F.2d at 892 n.2; *Cohen I*, 809 F. Supp. at 993.

travel, equipment, and post-season competition. *Id.* at 189-90.

Brown's decision to demote the women's volleyball and gymnastics teams and the men's water polo and golf teams from university-funded varsity status was apparently made in response to a university-wide cost-cutting directive. *Cohen I*, 809 F. Supp. at 981. The district court found that Brown saved $62,028 by demoting the women's teams and $15,795 by demoting the men's teams, but that the demotions "did not appreciably affect the athletic participation gender ratio." *Cohen III* at 187 n.2.

Plaintiffs alleged that, at the time of the demotions, the men students at Brown already enjoyed the benefits of a disproportionately large share of both the university resources allocated to athletics and the intercollegiate participation opportunities afforded to student athletes. Thus, plaintiffs contended, what appeared to be the even-handed demotions of two men's and two women's teams, in fact, perpetuated Brown's discriminatory treatment of women in the administration of its intercollegiate athletics program.

In the course of the preliminary injunction hearing, the district court found that, in the academic year 1990-91, Brown funded 31 intercollegiate varsity teams, 16 men's teams and 15 women's teams, *Cohen I*, 809 F. Supp. at 980, and that, of the 894 undergraduate students competing on these teams, 63.3% (566) were men and 36.7% (328) were women, *id.* at 981. During the same academic year, Brown's undergraduate enrollment comprised 52.4% (2,951) men and 47.6% (2,683) women. *Id.* The district court also summarized the history of athletics at Brown, finding, *inter alia*, that, while nearly all of the men's varsity teams were established before 1927, virtually all of the women's varsity teams were created between 1971 and 1977, after Brown's merger with Pembroke College. *Id.* The only women's varsity team created after this period was winter track, in 1982. *Id.*

In the course of the trial on the merits, the district court found that, in 1993-94, there were 897 students participating in intercollegiate varsity athletics, of which 61.87% (555) were men and 38.13% (342) were women. *Cohen III,* 879 F. Supp. at 192. During the same period, Brown's undergraduate enrollment comprised 5,722 students, of which 48.86% (2,796) were men and 51.14% (2,926) were women. *Id.* The district court found that, in 1993-94, Brown's intercollegiate athletics program consisted of 32 teams, 16 men's teams and 16 women's teams. *Id.* Of the university-funded teams, 12 were men's teams and 13 were women's teams; of the donor-funded teams, three were women's teams and four were men's teams. *Id.* At the time of trial, Brown offered 479 university-funded varsity positions for men, as compared to 312 for women; and 76 donor-funded varsity positions for men, as compared to 30 for women. *Id.* at 211. In 1993-94, then, Brown's varsity program—including both university- and donor-funded sports—afforded over 200 more positions for men than for women. *Id.* at 192. Accordingly, the district court found that Brown maintained a 13.01% disparity between female participation in intercollegiate athletics and female student enrollment, *id.* at 211, and that "[a]lthough the number of varsity sports offered to men and women are equal, the selection of sports offered to each gender generates far more individual positions for male athletes than for female athletes," *id.* at 189.

In computing these figures, the district court counted as participants in intercollegiate athletics for purposes of Title IX analysis those athletes who were members of varsity teams for the majority of the last complete season. *Id.* at 192. Brown argued at trial that "there is no consistent measure of actual participation rates because team size varies throughout the athletic season," and that "there is no consistent measure of actual participation rates because there are alternative definitions

of 'participant' that yield very different participation totals." *Id.* Reasoning that "[w]here both the athlete and coach determine that there is a place on the team for a student, it is not for this Court to second-guess their judgment and impose its own, or anyone else's, definition of a valuable or genuine varsity experience," the district court concluded that "[e]very varsity team member is therefore a varsity 'participant.'" *Id.* (original emphasis omitted). Thus, the district court held that

> the "participation opportunities" offered by an institution are measured by counting the *actual participants* on intercollegiate teams. The number of participants in Brown's varsity athletic program accurately reflects the number of participation opportunities Brown offers because the University, through its practices "predetermines" the number of athletic positions available to each gender.

Id. at 202-03.

The district court found from extensive testimony that the donor-funded women's gymnastics, women's fencing and women's ski teams, as well as at least one women's club team, the water polo team, had demonstrated the interest and ability to compete at the top varsity level and would benefit from university funding.[4] *Id.* at 190.

The district court did *not* find that full and effective accommodation of the athletics interests and abilities of Brown's female students would disadvantage Brown's male students.

---

[4] The district court noted that "there may be other women's club sports with sufficient interest and ability to warrant elevation to varsity status," but that plaintiffs did not introduce at trial substantial evidence demonstrating the existence of other women's club teams meeting the criteria. *Cohen III*, 879 F. Supp. at 190 n. 14.

II.

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C.A. § 1681(a) (West 1990). As a private institution that receives federal financial assistance, Brown is required to comply with Title IX.

Title IX also specifies that its prohibition against gender discrimination shall not "be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist" between the total number or percentage of persons of that sex participating in any federally supported program or activity, and "the total number or percentage of persons of that sex in any community, State, section, or other area." 20 U.S.C.A. § 1681(b) (West 1990). Subsection (b) also provides, however, that it "shall not be construed to prevent the consideration in any . . . proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex." *Id.*

Applying § 1681(b), the prior panel held that Title IX "does not mandate strict numerical equality between the gender balance of a college's athletic program and the gender balance of its student body." *Cohen II*, 991 F.2d at 894. The panel explained that, while evidence of a gender-based disparity in an institution's athletics program is relevant to a determination of noncompliance, "a court assessing Title IX compliance may not find a violation *solely* because there is a disparity between the gender composition of an educational institution's student constituency, on the one hand, and its athletic programs, on the other hand." *Id.* at 895.

Congress enacted Title IX in response to its finding—after extensive hearings held in 1970 by the House Special Subcommittee on Education—of pervasive discrimination against women with respect to educational opportunities. 118 Cong. Rec. 5804 (1972) (remarks of Sen. Bayh); *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 523 n.13 (1982).

Title IX was passed with two objectives in mind: "to avoid the use of federal resources to support discriminatory practices," and "to provide individual citizens effective protection against those practices" *Cannon* v. *University of Chicago*, 441 U.S. 677, 704 (1979). To accomplish these objectives, Congress directed all agencies extending financial assistance to educational institutions to develop procedures for terminating financial assistance to institutions that violate Title IX. 20 U.S.C. § 1682.

The agency responsible for administering Title IX is the United States Department of Education ("DED"), through its Office for Civil Rights ("OCR").[5] Congress expressly delegated to DED the authority to promulgate regulations for determining whether an athletics program complies with Title IX. Pub. L. No. 93-380, 88 Stat. 612 (1974).[6] The regulations specifically address ath-

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[5] Agency responsibility for administration of Title IX shifted from the Department of Health, Education and Welfare ("HEW") to DED when HEW split into two agencies, DED and the Department of Health and Human Services. The regulations and agency documents discussed herein were originally promulgated by HEW, the administering agency at the time, and later adopted by the present administering agency, DED. *See Cohen II*, 991 F.2d at 895; *Cohen III*, 879 F. Supp. at 194-95 n.23. For simplicity, we treat DED as the promulgating agency.

[6] HEW apparently received an unprecedented 9,700 comments on the proposed Title IX athletics regulations, *see Haffer* v. *Temple Univ. of the Commonwealth Sys. of Higher Educ.*, 524 F. Supp. 531, 536 n.9 (1981) (citing Thomas A. Cox, *Intercollegiate Athletics and Title IX*, 46 Geo. Wash. L. Rev. 34, 40 (1977) ("Cox")), prompting former HEW Secretary Caspar Weinberger to remark,

letics at 34 C.F.R. §§ 106.37(c) and 106.41. The regulation at issue in this case, 34 C.F.R. § 106.41 (1995), provides:

> (a) *General.* No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.
>
> (b) *Separate teams.* Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection of such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.
>
> c) *Equal Opportunity.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

"I had not realized until the comment period that athletics is the single most important thing in the United States," *id.* (citing Cox at 34, quoting N.Y. Times, June 27, 1975, at 16, col. 4).

(1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;

(2) The provision of equipment and supplies;

(3) Scheduling of games and practice time;

(4) Travel and per diem allowance;

(5) Opportunity to receive coaching and academic tutoring;

(6) Assignment and compensation for coaches and tutors;

(7) Provision of locker rooms, practice and competitive facilities;

(8) Provision of medical and training facilities and services;

(9) Provision of housing and dining facilities and services;

(10) Publicity.

In the first appeal, this court held that an institution's failure effectively to accommodate both genders under § 106.41(c)(1) is sufficient to establish a violation of Title IX. *Cohen II*, 991 F.2d at 897.

In 1978, several years after the promulgation of the regulations, OCR published a proposed "Policy Interpretation," the purpose of which was to clarify the obligations of federal aid recipients under Title IX to provide equal opportunities in athletics programs. "In particular, this Policy Interpretation provides a means to assess an institution's compliance with the equal opportunity requirements of the regulation which are set forth at [34 C.F.R. §§ 106.37(c) and 106.41(c)]." 44 Fed. Reg. at 71,415. After considering a large number of public comments, OCR published the final Policy Interpretation. 44 Fed. Reg. 71,413-71,423 (1979). While the Policy Interpre-

tation covers other areas, this litigation focuses on the "Effective Accommodation" section, which interprets 34 C.F.R. § 106.41(c)(1), the first of the non-exhaustive list of ten factors to be considered in determining whether equal athletics opportunities are available to both genders. The Policy Interpretation establishes a three-part test, a two-part test, and factors to be considered in determining compliance under 34 C.F.R. § 106.41(c)(1). At issue in this appeal is the proper interpretation of the first of these, the so-called three-part test,[7] which inquires as follows:

> (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
>
> (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
>
> (3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

44 Fed. Reg. at 71,418.

The district court held that, "because Brown maintains a 13.01% disparity between female participation in intercollegiate athletics and female student enrollment, it can-

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[7] For clarification, we note that the cases refer to each part of this three-part test as a "prong" or a "benchmark." Prong one is also called the "substantial proportionality test."

not gain the protection of prong one." *Cohen III*, 879 F. Supp. at 211. Nor did Brown satisfy prong two. While acknowledging that Brown "has an impressive *history* of program expansion," the district court found that Brown failed to demonstrate that it has "maintained a *continuing practice* of intercollegiate program expansion for women, the underrepresented sex." *Id.* The court noted further that, because merely reducing program offerings to the overrepresented gender does not constitute program expansion for the underrepresented gender, the fact that Brown has eliminated or demoted several men's teams does not amount to a continuing practice of program expansion for women. *Id.* As to prong three, the district court found that Brown had not "*fully* and effectively accommodated the interest and ability of the underrepresented sex 'to the extent necessary to provide equal opportunity in the selection of sports and levels of competition available to members of both sexes.'" *Id.* (quoting the Policy Interpretation, 44 Fed. Reg. at 71,417).

On January 16, 1996, DED released a "Clarification Memorandum," which does not change the existing standards for compliance, but which does provide further information and guidelines for assessing compliance under the three-part test. The Clarification Memorandum contains many examples illustrating how institutions may meet each prong of the three-part test and explains how participation opportunities are to be counted under Title IX.

The district court found that Brown predetermines the approximate number of varsity positions available to men and women, and, thus, that "the concept of any measure of unfilled but available athletic slots does not comport with reality." *Cohen III*, 879 F. Supp. at 203 n.36. The district court concluded that intercollegiate athletics opportunities "means real opportunities, not illusory ones, and therefore should be measured by counting *actual par-*

ticipants." Id. at 204 (internal quotation marks and citations omitted).

Title IX is an anti-discrimination statute, modeled after Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d ("Title VI").[8] *See Cannon*, 441 U.S. at 696 ("The drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years."). Thus, Title IX and Title VI share the same constitutional underpinnings. *See* Jeffrey H. Orleans, *An End To The Odyssey: Equal Athletic Opportunities For Women*, 3 Duke J. Gender L. & Pol'y 131, 133-34 (1996).

Although the statute itself provides for no remedies beyond the termination of federal funding, the Supreme Court has determined that Title IX is enforceable through an implied private right of action, *Cannon*, 441 U.S. at 703, and that damages are available for an action brought under Title IX, *Franklin* v. *Gwinnett County Pub. Sch.*, 503 U.S. 60, 76 (1992). The right to injunctive relief under Title IX appears to have been impliedly accepted by the Supreme Court in *Franklin*. *Id.* at 64-66, 71-73. In addition, a majority of the Court in *Guardians Ass'n* v. *Civil Serv. Comm'n*, 463 U.S. 582 (1983), agreed that injunctive relief and other equitable remedies are appropriate for violations of Title VI.

According to the statute's senate sponsor, Title IX was intended to

> provide for the women of America something that is rightfully theirs—an equal chance to attend the schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they will have a fair chance to secure the jobs of their choice with equal pay for equal work.

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[8] Title VI prohibits discrimination on the basis of race, color, or national origin in institutions benefitting from federal funds.

118 Cong. Rec. 5808 (1972) (remarks of Sen. Bayh) (*quoted in Haffer*, 524 F. Supp. at 541).

III.

In *Cohen II*, a panel of this court squarely rejected Brown's constitutional and statutory challenges to the Policy Interpretation's three-part test, upholding the district court's interpretation of the Title IX framework applicable to intercollegiate athletics, *Cohen II*, 991 F.2d at 899-902, as well as its grant of a preliminary injunction in favor of the plaintiffs, *id.* at 906-07. Despite the fact that it presents substantially the same legal arguments in this appeal as were raised and decided in the prior appeal, Brown asserts that there is "no impediment" to this court's plenary review of these decided issues. We disagree.

The law of the case doctrine precludes relitigation of the legal issues presented in successive stages of a single case once those issue have been decided. *See* 1B James W. Moore et al., Moore's Federal Practice ¶ 0.404[1] (2d ed. 1993) (hereinafter "Moore"). "The doctrine of the law of the case directs that a decision of an appellate court on an issue of law, unless vacated or set aside, governs the issue during all subsequent stages of litigation in the *nisi prius* court and thereafter on any further appeal." *Commercial Union Ins. Co.* v. *Walbrook Ins. Co.*, 41 F.3d 764, 769 (1st. Cir. 1994) (citing *United States* v. *Rivera-Martinez*, 931 F.2d 148 (1st Cir.), *cert. denied*, 502 U.S. 862 (1991)). The reviewing court's mandate "constitutes the law of the case on such issues of law as were actually considered and decided by the appellate court, or as were necessarily inferred from the disposition on appeal." *Commercial Union Ins. Co.*, 41 F.3d at 770 (citing 1B Moore at ¶ 0.404[10]). The doctrine requires a trial court on remand to dispose of the case in accordance with the appellate court's mandate by implementing " 'both the letter and the spirit of the mandate, taking into account the appellate court's opinion and the circum-

stances it embraces,' " *United States* v. *Connell*, 6 F.3d 27, 30 (1st Cir. 1993) (quoting *United States* v. *Kikumura*, 947 F.2d 72, 76 (3d Cir. 1991)), and binds newly constituted panels to prior panel decisions on point, *e.g.*, *Irving* v. *United States*, 49 F.3d 830, 833-34 (1st Cir. 1995); *Metcalf & Eddy, Inc.* v. *Puerto Rico Aqueduct and Sewer Auth.*, 991 F.2d 935, 939 n.3 (1st Cir. 1993).

While we have acknowledged that there are exceptions to the law of the case doctrine, we have emphasized that the circumstances in which they apply are rare. As have a number of other circuits, we have determined that issues decided on appeal should not be reopened " 'unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice. " *Rivera-Martinez*, 931 F.2d at 151 (quoting *White* v. *Murtha*, 377 F.2d 428, 432 (5th Cir. 1967)) (other citations omitted).

Brown's argument that the Supreme Court's recent decision in *Adarand Constr., Inc.* v. *Pena*, —— U.S. ——, 115 S. Ct. 2097 (1995) ("*Adarand*"), controls this case necessarily presumes that *Adarand* constitutes a contrary intervening decision by controlling authority on point that (i) undermines the validity of *Cohen II*; (ii) compels us to depart from the law of the case doctrine; and (iii) therefore mandates that we reexamine Brown's equal protection claim.

We have narrowly confined the "intervening controlling authority exception" to Supreme Court opinions, *en banc* opinions of this court, or statutory overrulings. *Irving*, 49 F.3d at 834. We have also recognized that this exception may apply "in those rare situations where newly emergent authority, although not directly controlling, nevertheless offers a convincing reason for believing that the earlier panel, in light of the neoteric developments, would change its course." *Id.* (internal quotation marks and citation omitted).

The law of the case doctrine is a prudential rule of policy and practice, rather than "an absolute bar to reconsideration [ ]or a limitation on a federal court's power." *Rivera-Martinez*, 931 F.2d at 150-51. Thus, we have not construed the doctrine as "an inflexible straitjacket that invariably requires rigid compliance." *Northeast Utils. Serv. Co.* v. *Federal Energy Regulatory Comm'n*, 55 F.3d 686, 688 (1st Cir. 1995). Nevertheless, the doctrine serves important goals and must be "treated respectfully and, in the absence of exceptional circumstances, applied according to its tenor." *Rivera-Martinez*, 931 F.2d at 151. Accordingly, we have held that only a few exceptional circumstances can overcome the interests served by adherence to the doctrine and these exceptions are narrowly circumscribed. *See id.*; *see also United States* v. *Reveron Martinez*, 836 F.2d 684, 687 n.2 (1st Cir. 1988) ("To be sure, there may be occasions when courts can—and should—loosen the iron grip of *stare decisis*. But any such departure 'demands special justification.' ") (quoting *Arizona* v. *Rumsey*, 467 U.S. 203, 212 (1984)).[9]

For the reasons that follow, we conclude that no exception to the law of the case doctrine applies here and, therefore, that *Cohen II*'s rulings of law control the disposition of this appeal.

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[9] The law of the case doctrine is "akin to the doctrines of *collateral estoppel*, *res judicata*, and *stare decisis*," Joan Steinman, *Law Of The Case: A Judicial Puzzle In Consolidated And Transferred Cases And In MultiDistrict Litigation*, 135 U. Penn. L. Rev. 595, 598-99 (1987) (footnotes omitted), and "has been said to lie half way between *stare decisis* and *res judicata*," 1B Moore at ¶ 0.404[1] n.3 (internal quotation marks and citation omitted). As applied in the federal courts today, the law of the case doctrine more closely resembles the doctrine of *stare decisis*. 1B Moore at ¶ 0.404[1]. Both doctrines reflect concerns that have long been recognized as fundamentally important to the rule of law—e.g., stability, predictability, and respect for judicial authority—and both doctrines are applied "with more or less rigidity depending on which interest is served." *Id.* at II-2.

Brown contends that *stare decisis* does not bind this panel "to the previous preliminary ruling of this Court because it lacks the element of finality," Reply Br. at 24, and that the law of the case doctrine does not prevent a court from "changing its mind," *id.* at n.47.

We acknowledge that we have repeatedly emphasized that conclusions and holdings regarding the merits of issues presented on appeal from a grant of a preliminary injunction are to be understood as statements as to probable outcomes. *E.g., A.M. Capens Co.* v. *American Trading and Prod. Co.*, 74 F.3d 317, 322 (1st Cir. 1996); *Narragansett Indian Tribe* v. *Guilbert*, 934 F.2d 4, 6 (1st Cir. 1991). The concern informing this caveat arises when we are asked to rule on the propriety of a district court's grant of a preliminary injunction (or otherwise issue a preliminary ruling) without benefit of full argument and a well-developed record. In this case, however, the record before the prior panel was "sufficiently developed and the facts necessary to shape the proper legal matrix [we]re sufficiently clear," *Cohen II*, 991 F.2d at 904, and nothing in the record subsequently developed at trial constitutes substantially different evidence that might undermine the validity of the prior panel's rulings of law. In considering plaintiff's motion for a preliminary injunction in *Cohen I*, the district court (i) "paid meticulous attention to the parties' prospects for success over the long haul;" (ii) "plainly visualized both the factual intricacies and legal complexities that characterize Title IX litigation;" (iii) "held a lengthy adversary hearing and reviewed voluminous written submissions;' and (iv) "correctly focused on the three-part accommodation test. *Cohen II*, 991 F.2d at 903. Further, as the district court noted in its opinion after the trial on the merits, "[n]othing in the record before me, now fully developed, undermines the considered legal framework established by the First Circuit at the preliminary injunction stage." *Cohen III*, 879 F. Supp. at 194.

Brown offers remarkably little in the way of analysis or authority to support its blithe contention that we are free to disregard *Cohen II* in disposing of this appeal. Indeed, Brown argues as if the prior panel had not decided the precise statutory interpretation questions presented (which it clearly did) and as if the district court's liability analysis were contrary to the law enunciated in *Cohen II* (which it clearly is not). Finding Brown's bare assertions to be unpersuasive, we decline the invitation to this court to "change its mind." The precedent established by the prior panel is not clearly erroneous; it is the law of this case and the law of this circuit.

IV.

Brown contends that the district court misconstrued and misapplied the three-part test. Specifically, Brown argues that the district court's interpretation and application of the test is irreconcilable with the statute, the regulation, and the agency's interpretation of the law, and effectively renders Title IX an "affirmative action statute" that mandates preferential treatment for women by imposing quotas in excess of women's relative interests and abilities in athletics. Brown asserts, in the alternative, that if the district court properly construed the test, then the test itself violates Title IX and the United States Constitution.

We emphasize two points at the outset. First, notwithstanding Brown's persistent invocation of the inflammatory terms "affirmative action," "preference," and "quota," this is not an affirmative action case. Second, Brown's efforts to evade the controlling authority of *Cohen II* by recasting its core legal arguments as challenges to the "district court's interpretation" of the law are unavailing; the primary arguments raised here have already been litigated and decided adversely to Brown in the prior appeal.

A.

Brown's talismanic incantation of "affirmative action" has no legal application to this case and is not helpful to Brown's cause. While "affirmative action" may have different connotations as a matter of politics, as a matter of law, its meaning is more circumscribed. True affirmative action cases have historically involved a voluntary [10] undertaking to remedy discrimination (as in a program implemented by a governmental body, or by a private employer or institution), by means of specific group-based preferences or numerical goals, and a specific timetable for achieving those goals. *See Adarand*, —— U.S. ——, 115 S. Ct. 2097 (1995) (remanding for review under strict scrutiny a challenge to a federal statute establishing a government-wide goal for awarding to minority businesses not less than 5% of the total value of all prime contracts and subcontracts for each fiscal year); *Metro Broadcasting* v. *FCC*, 497 U.S. 547 (1990) (upholding a federal program requiring race-based preferences); *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989) (striking down a municipal set-aside program requiring that 30% of the city's construction dollars be paid to racial minority subcontractors on an annual basis); *Johnson* v. *Transportation Agency*, 480 U.S. 616 (1986) (upholding a temporary program authorizing a county agency to consider sex and race as factors in making promotions in order to achieve a statistically

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[10] Cases and commentators sometimes treat cases involving involuntarily implemented plans—e.g., plans adopted pursuant to a consent decree or a contempt order—as affirmative action cases. *See, e.g., United States* v. *Paradise*, 480 U.S. 149 (1987) (upholding a "one-black-for-one-white" promotion requirement ordered by a district court as an interim measure in response to proven discrimination by a state employer); *Sheet Metal Workers* v. *EEOC*, 478 U.S. 421 (1986) (upholding a federal district court's imposition on the union a goal for racial minority membership as a remedy for the union's contempt of the court's earlier orders to cease racially discriminatory admissions practices).

measurable improvement in the representation of women and minorities in major pob classifications in which they had been historically underrepresented); *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (striking down a collective-bargaining faculty layoff provision requiring preferential treatment for certain racial minorities); *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980) (upholding a federal program requiring state and local recipients of federal public works grants to set aside 10% of funds for procuring goods and services from minority business enterprises); *United Steelworkers* v. *Weber*, 443 U.S. 193 (1979) (upholding a collective bargaining agreement that set aside for blacks half the places in a new training program until the percentage of blacks among skilled workers at the plant was commensurate with the percentage of blacks in the local labor force); *Regents of the Univ. of Cal.* v. *Bakke*, 438 U.S. 265 (1978) (striking down a state medical school's admissions policy that set aside 16 of its places for racial minorities).

Title IX is not an affirmative action statute; it is an anti-discrimination statute, modeled explicitly after another anti-discrimination statute, Title VI. No aspect of the Title IX regime at issue in this case—inclusive of the statute, the relevant regulation, and the pertinent agency documents—mandates gender-based preferences or quotas, or specific timetables for implementing numerical goals.

Like other anti-discrimination statutory schemes, the Title IX regime *permits* affirmative action.[11] In addition,

[11] As previously noted, Title IX itself specifies only that the statute shall not be interpreted to *require* gender-based preferential or disparate treatment. 20 U.S.C. § 1681(b). However, although Congress could easily have done so, it did not ban affirmative action or gender-conscious remedies under Title IX. *See also Weber*, 443 U.S. at 201-02 (construing the prohibition against race discrimination contained in §§ 703(a) and (d) of Title VII, and concluding that "an interpretation of the sections that forbade all race-conscious affirmative action would bring about an end completely

Title IX, like other anti-discrimination schemes, permits an inference that a significant gender-based statistical disparity may indicate the existence of discrimination. Consistent with the school desegregation cases, the question of substantial proportionality under the Policy Interpretation's three-part test is merely the starting point for analysis, rather than the conclusion; a rebuttable presumption, rather than an inflexible requirement. *See, e.g., Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 25 (1971). In short, the substantial proportionality test is but one aspect of the inquiry into whether an institution's athletics program complies with Title IX.

Also consistent with the school desegregation cases, the substantial proportionality test of prong one is applied under the Title IX framework, not mechanically, but case-by-case, in a fact-specific manner. As with other anti-discrimination regimes, Title IX neither mandates a finding of discrimination based solely upon a gender-based statistical disparity, *see Cohen II*, 991 F.2d at 895, nor prohibits gender-conscious remedial measures. *See Missouri* v. *Jenkins*, —— U.S. ——, ——, 115 S. Ct. 2038, 2048 (1995) (acknowledging the constitutional permissibility of court-ordered, race-conscious remedial plans designed to restore victims of discrimination to the positions they would have occupied in the absence of such conduct); *Fullilove*, 448 U.S. at 483 (recognizing that the authority of a federal court to incorporate racial criteria into a remedial decree also extends to statutory

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at variance with the purpose of the statute and must be rejected") (internal quotation marks and citations omitted); *id.* at 205-06 (construing § 703(j) of Title VII, upon which § 1681(b) of Title IX was based, and concluding that "[t]he natural inference is that Congress chose not to forbid all voluntary race-conscious affirmative action").

In addition, remedial action and voluntary affirmative action to overcome the effects of gender discrimination are permitted under the Title IX regulations, 34 C.F.R. § 106.3, and by the Policy Interpretation, 44 Fed. Reg. at 71,416.

violations and that, where federal anti-discrimination laws have been violated, race-conscious remedies may be appropriate); *Weber*, 443 U.S. at 197 (holding that Title VII does not prohibit private employers from voluntarily implementing race-conscious measures to eliminate "manifest racial imbalances in traditionally segregated job categories"); *McDaniel* v. *Barresi*, 402 U.S. 39, 41 (1971) (recognizing that measures required to remedy race discrimination "will almost invariably require" race conscious classifications, and that "[a]ny other approach would freeze the status quo that is the very target of all desegregation processes").

Another important distinction between this case and affirmative action cases is that the district court's remedy requiring Brown to accommodate fully and effectively the athletics interests and abilities of its women students does not raise the concerns underlying the Supreme Court's requirement of a particularized factual predicate to justify voluntary affirmative action plans. In reviewing equal protection challenges to such plans, the Court is concerned that government bodies are reaching out to implement race- or gender-conscious remedial measures that are "ageless in their reach into the past, and timeless in their ability to affect the future," *Wygant*, 476 U.S. at 276, on the basis of facts insufficient to support a prima facie case of a constitutional or statutory violation, *Croson*, 488 U.S. at 500, to the benefit of unidentified victims of past discrimination, *see id.* at 469; *Wygant*, 476 U.S. at 276. Accordingly, the Court has taken the position that voluntary affirmative action plans cannot be constitutionally justified absent a particularized factual predicate demonstrating the existence of "identified discrimination," *see Croson*, 488 U.S. at 500-06, because "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy," *Wygant*, 476 U.S. at 276.

From a constitutional standpoint, the case before us is altogether different. Here, gender-conscious relief was ordered by an Article III court, constitutionally compelled to have before it litigants with standing to raise the cause of action alleged; for the purpose of providing relief upon a duly adjudicated determination that specific defendants had discriminated against a certified class of women in violation of a federal anti-discrimination statute; based upon findings of fact that were subject to the Federal Rules of Evidence. The factual problem presented in affirmative action cases is, "Does the evidence support a finding of discrimination such that race- or gender-conscious remedial measures are appropriate?" We find these multiple indicia of reliability and specificity to be sufficient to answer that question in the affirmative.

From the mere fact that a remedy flowing from a judicial determination of discrimination is gender-conscious, it does not follow that the remedy constitutes "affirmative action." Nor does a "reverse discrimination" claim arise every time an anti-discrimination statute is enforced. While some gender-conscious relief may adversely impact one gender—a fact that has not been demonstrated in this case—that alone would not make the relief "affirmative action" or the consequence of that relief "reverse discrimination." To the contrary, race- and gender-conscious remedies are both appropriate and constitutionally permissible under a federal anti-discrimination regime, although such remedial measures are still subject to equal protection review. *See Miller* v. *Johnson*, —— U.S. ——, ——, 115 S. Ct. 2475, 2491 (1995) ("compliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws") (citing *Shaw* v. *Reno*, 509 U.S. 630, 653-54 (1993)).

B.

Cohen II squarely rejected Brown's interpretation of the three-part test and carefully delineated its own, which is now the law of this circuit as well as the law of this case. On remand, the district court's liability analysis explicitly and faithfully adhered to *Cohen II*'s mandate, and we are bound to do the same at this stage of the litigation, absent one of the exceptional circumstances discussed *supra*. Because the precise questions presented regarding the proper interpretation of the Title IX framework were considered and decided by a panel of this court in the prior appeal, and because no exception to the law of the case doctrine is presented, we have no occasion to reopen the issue here. Brown's rehashed statutory challenge is foreclosed by the law of the case doctrine and we are therefore bound by the prior panel's interpretation of the statute, the regulation, and the relevant agency pronouncements.

In its liability analysis, the district court expressly accepted *Cohen II*'s elucidation of the applicable law, *Cohen III*, 879 F. Supp. at 194, and applied the law in accordance with its mandate, *id.* at 210-13. Indeed, every circuit court to have reviewed a Title IX claim of discrimination in athletics since *Cohen II* was decided is in accord with its explication of the Title IX regime as it applies to athletics. *See Horner* v. *Kentucky High Sch. Athletics Ass'n*, 43 F.3d 265 (6th Cir. 1994); *Kelley* v. *Board of Trustees*, 35 F.3d 265 (7th Cir. 1994), *cert. denied*, —— U.S. ——, 115 S. Ct. 938 (1995); *Favia* v. *Indiana Univ. of Pa.*, 7 F.3d 332 (3d Cir. 1993); *Roberts* v. *Colorado State Bd. of Agric.*, 998 F.2d 824 (10th Cir.), *cert. denied*, 510 U.S. 1004 (1993).

Cohen II held that the Policy Interpretation is entitled to substantial deference because it is the enforcing agency's "considered interpretation of the regulation." 991 F.2d at 896-97. Brown argues that the district court

erred in concluding that it was obligated to give substantial deference to the Policy Interpretation, on the ground that "the interpretation is not a worthy candidate for deference," Reply Br. at 15, because "the urged interpretation is illogical, conflicts with the Constitution, the Statute, the Regulation, other Agency materials and practices, existing analogous caselaw and, in addition, is bad policy," *id.* We reject Brown's kitchen-sink characterization of the Policy Interpretation and its challenge to the substantial deference accorded that document by the district court.

The Policy Interpretation represents the responsible agency's interpretation of the intercollegiate athletics provisions of Title IX and its implementing regulations. 44 Fed. Reg. at 71,413. It is well settled that, where, as here, Congress has expressly delegated to an agency the power to "elucidate a specific provision of a statute by regulation," the resulting regulations should be accorded "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). It is also well established " 'that an agency's construction of its own regulations is entitled to substantial deference.' " *Martin* v. *Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 150 (1991) (quoting *Lyng* v. *Payne*, 476 U.S. 926, 939 (1986)) (other citation omitted). As the Supreme Court has explained, "[b]ecause applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, we presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers." *Martin*, 499 U.S. at 151 (citation omitted).

Applying these principles, *Cohen II* held that the applicable regulation, 34 C.F.R. § 106.41, deserves controlling weight, 991 F.2d at 895; that the Policy Interpretation

warrants substantial deference, *id.* at 896-97; and that, "[b]ecause the agency's rendition stands upon a plausible, if not inevitable, reading of Title IX, we are obligated to enforce the regulation according to its tenor," *id.* at 899 (citations omitted). *Accord Horner*, 43 F.3d at 274-75; *Kelley*, 35 F.3d at 270; *Favia* v. *Indiana Univ. of Pa.*, 812 F. Supp. 578, 584 (W.D. Pa.), *aff'd*, 7 F.3d 332 (3d Cir. 1993). On remand, the district court properly applied the legal framework elucidated in *Cohen II* and explicitly followed this court's mandate in according controlling weight to the regulation and substantial deference to the Policy Interpretation. *Cohen III*, 879 F. Supp. at 197-99; *accord Kelley*, 35 F.3d at 272 (holding that "neither the regulation nor the policy interpretation run afoul of the dictates of Title IX"). We hold that the district court did not err in the degree of deference it accorded the regulation and the relevant agency pronouncements.

C.

As previously noted, the district court held that, for purposes of the three-part test, the intercollegiate athletics participation opportunities offered by an institution are properly measured by counting the number of actual participants on intercollegiate teams. *Cohen III*, 879 F. Supp. at 202. The Policy Interpretation was designed specifically for intercollegiate athletics.[12] 44 Fed. Reg. at 71,413. Because the athletics regulation distinguishes between club sports and intercollegiate sports, under the Policy Interpretation, "club teams will not be considered to be intercollegiate teams except in those instances where they regularly participate in varsity competition." *Id.* at n.1. Accordingly, the district court excluded club varsity teams from the definition of "intercollegiate teams" and,

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[12] Application of the Policy Interpretation is not limited to intercollegiate athletics, however. The Policy Interpretation states that "its general principles will often apply to club, intramural, and interscholastic athletic programs, which are also covered by the regulation." 44 Fed. Reg. at 71,413.

therefore, from the calculation of participation opportunities, because the evidence was inadequate to show that the club teams regularly participated in varsity competition. *Cohen III*, 879 F. Supp. at 200.

The district court's definition of athletics participation opportunities comports with the agency's own definition. *See* Clarification Memorandum at 2 ("In determining participation opportunities, OCR counts the number of actual athletes participating in the athletic program."). We find no error in the district court's definition and calculation of the intercollegiate athletics participation opportunities afforded to Brown students, and no error in the court's finding of a 13.01% disparity between the percentage of women participating in intercollegiate varsity athletics at Brown and the percentage of women in Brown's undergraduate student body.

D.

Brown contends that an athletics program equally accommodates both genders and complies with Title IX if it accommodates the *relative* interests and abilities of its male and female students. This "relative interests" approach posits that an institution satisfies prong three of the three-part test by meeting the interests and abilities of the underrepresented gender only to the extent that it meets the interests and abilities of the overrepresented gender.[13] *See Cohen II*, 991 F.2d at 899.

Brown maintains that the district court's decision imposes upon universities the obligation to engage in prefer-

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[13] We note that Brown presses its relative interests argument under both prong one and prong three. At trial, Brown argued that, "in order to succeed on prong one, plaintiffs bear the burden of proving that the percentage of women among varsity athletes is not substantially proportionate to the percentage of women among *students interested in participating in varsity athletics*." *Cohen III*, 879 F. Supp. at 205. At the preliminary injunction stage, Brown propounded the same relative interests argument under prong three. *Id.* at n.41.

ential treatment for women by requiring quotas in excess of women's relative interests and abilities. With respect to prong three, Brown asserts that the district court's interpretation of the word "fully" "requires universities to favor women's teams and treat them better than men's [teams]. . . . forces them to eliminate or cap men's teams. . . . [and] forces universities to impose athletic quotas in excess of relative interests and abilities." Appellant's Br. at 55.

The prior panel considered and rejected Brown's approach, observing that "Brown reads the 'full' out of the duty to accommodate 'fully and effectively.'" *Cohen II*, 991 F.2d at 899. Under *Cohen II*'s controlling interpretation, prong three "demands not merely some accommodation, but full and effective accommodation. If there is sufficient interest and ability among members of the statistically underrepresented gender, not slaked by existing programs, an institution necessarily fails this prong of the test." *Id.* at 898.

Brown's interpretation of full and effective accommodation is "simply not the law." *Cohen III*, 879 F. Supp. at 208. We agree with the prior panel and the district court that Brown's relative interests approach "cannot withstand scrutiny on either legal or policy grounds," *Cohen II*, 991 F.2d at 900, because it "disadvantages women and undermines the remedial purposes of Title IX by limiting required program expansion for the underrepresented sex to the status quo level of relative interests," *Cohen III*, 879 F. Supp. at 209. After *Cohen II*, it cannot be maintained that the relative interests approach is compatible with Title IX's equal accommodation principle as it has been interpreted by this circuit.

Brown argues that the district court's interpretation of the three-part test *requires* numerical proportionality, thus imposing a gender-based quota scheme in contravention of the statute. This argument rests, in part, upon Brown's reading of 20 U.S.C. § 1681(b) as a categorical proscrip-

tion against consideration of gender parity. Section 1681(b) provides:

> Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex *in any community, State, section or other area* . . . .

20 U.S.C.A. § 1681(b) (West 1990) (emphasis added).

The prior panel, like Brown, assumed without analysis that § 1681(b) applies unequivocally to intercollegiate athletics programs. We do not question *Cohen II*'s application of § 1681(b). We think it important to bear in mind, however, the congressional concerns that inform the proper interpretation of this provision. Section 1681(b) was patterned after § 703(j) of Title VII, 42 U.S.C. § 2000e-2(j), and was specifically designed to prohibit quotas in university admissions and hiring, based upon the percentage of individuals of one gender in a geographical community. *See* H.R. Rep. No. 554, 92d Cong., 1st Sess. (1971), *reprinted in* 1972 U.S.C.C.A.N. 2462, 2590-92 (Additional Views); 117 Cong. Rec. 39,261-62 (1971) (remarks of Rep. Quie); 117 Cong. Rec. 30,406, 30,409 (remarks of Sen. Bayh); 117 Cong. Rec. 39,251-52 (remarks of Rep. Mink and Rep. Green). Thus, the legislative history strongly suggests that the underscored language defines what is proscribed (in the contexts of admissions and hiring) in terms of a geographical area, *beyond the institution*, and does not refer to an imbalance *within the university*, with respect to the representation of each gender in intercollegiate athletics, as compared to the gender makeup of the student body.

In any event, the three-part test is, on its face, entirely consistent with § 1681(b) because the test does not *require* preferential or disparate treatment for either gender. Neither the Policy Interpretation's three-part test, nor the district court's interpretation of it, *mandates* statistical balancing; "[r]ather, the policy interpretation merely creates a presumption that a school is in compliance with Title IX and the applicable regulation when it achieves such a statistical balance." *Kelley*, 35 F.3d at 271.

The test is also entirely consistent with § 1681(b) as applied by the prior panel and by the district court. As previously noted, *Cohen II* expressly held that "a court assessing Title IX compliance may not find a violation *solely* because there is a disparity between the gender composition of an educational institution's student constituency, on the one hand, and its athletic programs, on the other hand." 991 F.2d at 895. The panel then carefully delineated the burden of proof, which requires a Title IX plaintiff to show, not only "disparity between the gender composition of the institution's student body and its athletic program, thereby proving that there is an underrepresented gender," *id.* at 901, but also "that a second element—unmet interest—is present," *id.*, meaning that the underrepresented gender has not been fully and effectively accommodated by the institution's present athletic program, *id.* at 902 (citing 44 Fed. Reg. at 71,418). Only where the plaintiff meets the burden of proof on these elements *and* the institution fails to show as an affirmative defense a history and continuing practice of program expansion responsive to the interests and abilities of the underrepresented gender will liability be established. Surely this is a far cry from a one-step imposition of a gender-based quota.

Brown simply ignores the fact that it is required to accommodate fully the interests and abilities of the underrepresented gender, not because the three-part test mandates preferential treatment for women *ab initio*, but be-

cause Brown has been found (under prong one) to have allocated its athletics participation opportunities so as to create a significant gender-based disparity with respect to these opportunities, and has failed (under prong two) to show a history and continuing practice of expansion of opportunities for the underrepresented gender. Brown's interpretation conflates prongs one and three and distorts the three-part test by reducing it to an abstract, mechanical determination of strict numerical proportionality. In short, Brown treats the three-part test for compliance as a one-part test for strict liability.

Brown also fails to recognize that Title IX's remedial focus is, quite properly, not on the overrepresented gender, but on the underrepresented gender; in this case, women. Title IX and its implementing regulations protect the class for whose special benefit the statute was enacted. *See Cannon*, 441 U.S. at 694. It is women and not men who have historically and who continue to be underrepresented in sports, not only at Brown, but at universities nationwide. *See Williams* v. *School Dist. of Bethlehem, Pa.*, 998 F.2d 168, 175 (1993) (observing that, although Title IX and its regulations apply equally to boys and girls, "it would require blinders to ignore that the motivation for promulgation of the regulation on athletics was the historic emphasis on boys' athletic programs to the exclusion of girls' athletic programs in high schools as well as colleges"), *cert. denied*, 510 U.S. 1043 (1994).

The prior panel held that "[t]he fact that the overrepresented gender is less than fully accommodated will not, in and of itself, excuse a shortfall in the provision of opportunities for the underrepresented gender." *Cohen II*, 991 F.2d at 899. Instead, the law requires that, absent a demonstration of continuing program expansion for the underrepresented gender under prong two of the three-part test, an institution must either provide athletics opportunities in proportion to the gender composition of the student body so as to satisfy prong one, or fully

accommodate the interests and abilities of athletes of the underrepresented gender under prong three. *Id.* In other words,

> If a school, like Brown, eschews the first two benchmarks of the accommodation test, electing to stray from substantial proportionality and failing to march uninterruptedly in the direction of equal athletic opportunity, it must comply with the third benchmark. To do so, the school must fully and effectively accommodate the underrepresented gender's interests and abilities, even if that requires it to give the underrepresented gender (in this case, women) what amounts to a larger slice of a shrinking athletic-opportunity pie.

Id. at 906.

We think it clear that neither the Title IX framework nor the district court's interpretation of it mandates a gender-based quota scheme. In our view, it is Brown's relative interests approach to the three-part test, rather than the district court's interpretation, that contravenes the language and purpose of the test and of the statute itself. To adopt the relative interests approach would be, not only to overrule *Cohen II*, but to rewrite the enforcing agency's interpretation of its own regulation so as to incorporate an entirely different standard for Title IX compliance. This relative interests standard would entrench and fix by law the significant gender-based disparity in athletics opportunities found by the district court to exist at Brown, a finding we have held to be not clearly erroneous. According to Brown's relative interests interpretation of the equal accommodation principle, the gender-based disparity in athletics participation opportunities at Brown is due to a lack of interest on the part of its female students, rather than to discrimination, and any attempt to remedy the disparity is, by definition, an unlawful quota. This approach is entirely contrary to "Congress's unmistakably clear mandate that educational

institutions not use federal monies to perpetuate gender-based discrimination," *id.* at 907, and makes it virtually impossible to effectuate Congress's intent to eliminate sex discrimination in intercollegiate athletics.

E.

Brown also claims error in the district court's failure to apply Title VII standards to its analysis of whether Brown's intercollegiate athletics program complies with Title IX. The district court rejected the analogy to Title VII, noting that, while Title VII "seeks to determine whether gender-neutral job openings have been filled without regard to gender[,] Title IX . . . was designed to address the reality that sports teams, unlike the vast majority of jobs, *do* have official gender requirements, and this statute accordingly approaches the concept of discrimination differently from Title VII." *Cohen III*, 879 F. Supp. at 205.

It does not follow from the fact that § 1681(b) was patterned after a Title VII provision that Title VII standards should be applied to a Title IX analysis of whether an intercollegiate athletics program equally accommodates both genders, as Brown contends. While this court has approved the importation of Title VII standards into Title IX analysis, we have explicitly limited the crossover to the employment context. *See Cohen II*, 991 F.2d at 902 (citing *Lipsett* v. *University of P.R.*, 864 F.2d 881, 897 (1st Cir. 1988)); *but see Brown* v. *Hot, Sexy and Safer Prods., Inc.*, 68 F.3d 525, 540 (1st Cir. 1995) (Title VII sexual harassment standards applied to Title IX sexual harassment case in non-employment context), *cert. denied*, —— U.S. ——, 116 S. Ct. 1044 (1996).

As *Cohen II* recognized, "[t]he scope and purpose of Title IX, which merely conditions government grants to educational institutions, are substantially different from those of Title VII, which sets basic employment stand-

ards." 991 F.2d at 902 (citation omitted). "[W]hereas Title VII is largely peremptory," Title IX is "largely aspirational," and thus, a "loosely laced buskin.' *Id.; see also North Haven,* 456 U.S. at 521 (directing that Title IX must be accorded "a sweep as broad as its language").

It is imperative to recognize that athletics presents a distinctly different situation from admissions and employment and requires a different analysis in order to determine the existence *vel non* of discrimination. While the Title IX regime *permits* institutions to maintain gender-segregated teams, the law does not require that student-athletes attending institutions receiving federal funds must compete on gender-segregated teams; nor does the law require that institutions provide completely gender-integrated athletics programs.[14] To the extent that Title IX allows institutions to maintain sngle-sex teams and gender-segregated athletics programs, men and women do not compete against each other for places on team rosters. Accordingly, and notwithstanding Brown's protestations

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[14] *See* 34 C.F.R. 106.41(b) (1995) ("[A] recipient *may* operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport.") (emphasis added). Nor do the regulations *require* institutions to field gender-integrated teams:

> However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport.

Id.

Whether or not the institution maintains gender-segregated teams, it must provide "gender-blind equality of opportunity to its student body." *Cohen II,* 991 F.2d at 896. While this case presents only the example of members of the underrepresented gender seeking the opportunity to participate on single-sex teams, the same analysis would apply where members of the underrepresented gender sought opportunities to play on co-ed teams.

to the contrary, the Title VII concept of the "qualified pool" has no place in a Title IX analysis of equal opportunities for male and female athletes because women are not "qualified" to compete for positions on men's teams, and vice-versa. In addition, the concept of "preference' does not have the same meaning, or raise the same equality concerns, as it does in the employment and admissions contexts.

Brown's approach fails to recognize that, because gender-segregated teams are the norm in intercollegiate athletics programs, athletics differs from admissions and employment in analytically material ways. In providing for gender-segregated teams, intercollegiate athletics programs *necessarily* allocate opportunities separately for male and female students, and, thus, any inquiry into a claim of gender discrimination *must* compare the athletics participation opportunities provided for men with those provided for women. For this reason, and because recruitment of interested athletes is at the discretion of the institution, there is a risk that the institution will recruit only enough women to fill positions in a program that already underrepresents women, and that the smaller size of the women's program will have the effect of discouraging women's participation.

In this unique context, Title IX operates to ensure that the gender-segregated allocation of athletics opportunities does not disadvantage either gender. Rather than create a quota or preference, this unavoidably gender-conscious comparison merely provides for the allocation of athletics resources and participation opportunities between the sexes in a non-discriminatory manner. As the Seventh Circuit observed, "Congress itself recognized that addressing discrimination in athletics presented a unique set of problems not raised in areas such as employment and academics." *Kelley*, 35 F.3d at 270 (citing *Sex Discrimination Regulations, Hearings Before the Subcommittee on Post Secondary Education of the Committee on Education*

and Labor, 94th Cong., 1st Sess. at 46, 54, 125, 129, 152, 177, 299-300 (1975); 118 Cong. Rec. 5807 (1972) (statement of Sen. Bayh); 117 Cong. Rec. 30,407 (1971) (same)).

In contrast to the employment and admissions contexts, in the athletics context, gender is not an irrelevant characteristic. Courts and institutions must have some way of determining whether an institution complies with the mandate of Title IX and its supporting regulations to provide equal athletics opportunities for both genders, despite the fact that the institution maintains single-sex teams, and some way of fashioning a remedy upon a determination that the institution does not equally and effectively accommodate the interests and abilities of both genders. As the *Kelley* Court pointed out (in the context of analyzing the deference due the relevant athletics regulation and the Policy Interpretation):

> Undoubtedly the agency responsible for enforcement of the statute could have required schools to sponsor a women's program for every men's program offered and vice versa. . . . It was not unreasonable, however, for the agency to reject this course of action. Requiring parallel teams is a rigid approach that denies schools the flexibility to respond to the differing athletic interests of men and women. It was perfectly acceptable, therefore, for the agency to chart a different course and adopt an enforcement scheme that measures compliance by analyzing how a school has allocated its various athletic resources.

Kelley, 35 F.3d at 271 (footnotes omitted).

Each prong of the Policy Interpretation's three-part test determines compliance in this manner.

> Measuring compliance through an evaluation of a school's allocation of its athletic resources allows schools flexibility in meeting the athletic interests of

> their students and increases the chance that the actual interests of those students will be met. And if compliance with Title IX is to be measured through this sort of analysis, it is only practical that schools be given some clear way to establish that they have satisfied the requirements of the statute. The substantial proportionality contained in Benchmark 1 merely establishes such a safe harbor.

Id. (citations omitted).

We find no error in the district court's refusal to apply Title VII standards in its inquiry into whether Brown's intercollegiate athletics program complies with Title IX. *See Cohen II*, 991 F.2d at 901 ("[T]here is no need to search for analogies where, as in the Title IX milieu, the controlling statutes and regulations are clear."). We conclude that the district court's application of the three-part test does not create a gender-based quota and is consistent with Title IX, 34 C.F.R. § 106.41, the Policy Interpretation, and the mandate of *Cohen II*.

F.

Brown has contended throughout this litigation that the significant disparity in athletics opportunities for men and women at Brown is the result of a gender-based differential in the level of interest in sports and that the district court's application of the three-part test requires universities to provide athletics opportunities for women to an extent that exceeds their relative interests and abilities in sports. Thus, at the heart of this litigation is the question whether Title IX permits Brown to deny its female students equal opportunity to participate in sports, based upon its unproven assertion that the district court's finding of a significant disparity in athletics opportunities for male and female students reflects, not discrimination in Brown's intercollegiate athletics program, but a lack

of interest on the part of its female students that is unrelated to a lack of opportunities.

We view Brown's argument that women are less interested than men in participating in intercollegiate athletics, as well as its conclusion that institutions should be required to accommodate the interests and abilities of its female students only to the extent that it accommodates the interests and abilities of its male students, with great suspicion. To assert that Title IX permits institutions to provide fewer athletics participation opportunities for women than for men, based upon the premise that women are less interested in sports than are men, is (among other things) to ignore the fact that Title IX was enacted in order to remedy discrimination that results from stereotyped notions of women's interests and abilities.

Interest and ability rarely develop in a vacuum; they evolve as a function of opportunity and experience. The Policy Interpretation recognizes that women's lower rate of participation in athletics reflects women's historical lack of opportunities to participate in sports. *See* 44 Fed. Reg. at 71,419 ("Participation in intercollegiate sports has historically been emphasized for men but not women. Partially as a consequence of this, participation rates of women are far below those of men.").

Moreover, the Supreme Court has repeatedly condemned gender-based discrimination based upon "archaic and overbroad generalizations" about women. *Schlesinger* v. *Ballard*, 419 U.S. 498, 508 (1975). *See, e.g., Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 725 (1982); *Califano* v. *Webster*, 430 U.S. 313, 317 (1977); *Frontiero* v. *Richardson*, 411 U.S. 677, 684-86 (1973). The Court has been especially critical of the use of statistical evidence offered to prove generalized, stereotypical notions about men and women. For example, in holding that Oklahoma's 3.2% beer statute invidiously discrim-

inated against males 18-20 years of age, the Court in *Craig* v. *Boren*, 429 U.S. 190, 208-209 (1976), stressed that "the principles embodied in the Equal Protection Clause are not to be rendered inapplicable by statistically measured but loose-fitting generalities." *See also id.* at 202 ("statistics exhibit a variety of . . . shortcomings that seriously impugn their value to equal protection analysis"); *id.* at 204 ("proving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause"); *Cannon*, 441 U.S. at 681 n.2 (observing with respect to the relevance of the University of Chicago's statistical evidence regarding the small number of female applicants to its medical school, in comparison to male applicants, that "the dampening impact of a discriminatory rule may undermine the relevance of figures relating to *actual* applicants").

Thus, there exists the danger that, rather than providing a true measure of women's interest in sports, statistical evidence purporting to reflect women's interest instead provides only a measure of the very discrimination that is and has been the basis for women's lack of opportunity to participate in sports. Prong three requires some kind of evidence of interest in athletics, and the Title IX framework permits the use of statistical evidence in assessing the level of interest in sports.[15] Nevertheless,

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[15] Under the Policy Interpretation,

> Institutions may determine the athletic interests and abilities of students by nondiscriminatory methods of their choosing provided:
>
> a. The processes take into account the nationally increasing levels of women's interests and abilities;
>
> b. The methods of determining interest and ability do not disadvantage the members of an underrepresented sex;
>
> c. The methods of determining ability take into account team performance records; and

to allow a numbers-based lack-of-interest defense to become the instrument of further discrimination against the underrepresented gender would pervert the remedial purpose of Title IX. We conclude that, even if it can be empirically demonstrated that, at a particular time, women have less interest in sports than do men, such evidence, standing alone, cannot justify providing fewer athletics opportunities for women than for men. Furthermore, such evidence is completely irrelevant where, as here, viable and successful women's varsity teams have been demoted or eliminated. We emphasize that, on the facts of this case, Brown's lack-of-interest arguments are of no con-

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d. The methods are responsive to the expressed interests of students capable of intercollegiate competition who are members of an underrepresented sex.

44 Fed. Reg. at 71,417.

The 1990 version of the Title IX Athletics Investigator's Manual, an internal agency document, instructs investigating officials to consider, *inter alia*, the following: (i) any institutional surveys or assessments of students' athletics interests and abilities, *see* Valerie M. Bonnette & Lamar Daniel, Department of Education, Title IX Athletics Investigator's Manual at 22 (1990); (ii) the "expressed interests" of the underrepresented gender, *id.* at 25; (iii) other programs indicative of interests and abilities, such as club and intramural sports, sports programs at "feeder" schools, community and regional sports programs, and physical education classes, *id.*

As the district court noted, however, the agency characterizes surveys as a "simple way to identify which additional sports might appropriately by created to achieve compliance. . . . Thus, a survey of interests would *follow* a determination that an institution does not satisfy prong three; it would not be utilized to make that determination in the first instance." *Cohen III*, 897 F. Supp. at 210 n.51; *see* 1990 Investigator's Manual at 27 (explaining that a survey or assessment of interests and abilities is not required by the Title IX regulation or the Policy Interpretation but may be required as part of a remedy when OCR has concluded that an institution's current program does not equally effectively accommodate the interests and abilities of students). (We note that the text of the 1990 Invesigator's Manual cited herein at page 25 was apparently at page 27 of the copy of the Manual before the district court.)

sequence. As the prior panel recognized, while the question of full and effective accommodation of athletics interests and abilities is potentially a complicated issue where plaintiffs seek to create a new team or to elevate to varsity status a team that has never competed at the varsity level, no such difficulty is presented here, where plaintiffs seek to reinstate what were successful university-funded teams right up until the moment the teams were demoted.[16] *Cohen II*, 991 F.2d at 904; *see also Cohen I*, 809 F. Supp. at 992 ("Brown is cutting off varsity opportunities where there is great interest and talent, *and* where Brown still has an imbalance between men and women varsity athletes in relation to their undergraduate enrollments.").

On these facts, Brown's failure to accommodate fully and effectively the interests and abilities of the underrepresented gender is clearly established. *See* Clarification Memorandum at 8 ("If an institution has recently eliminated a viable team from the intercollegiate program, OCR will find that there is sufficient interest, ability, and available competition to sustain an intercollegiate team in that sport unless an institution can provide strong evidence that interest, ability or available competition no longer exists."); *id.* at 8-9 n.2 ("While [other] indications of interest may be helpful to OCR in ascertaining likely interest on campus, particularly in the absence of more direct indicia[,] an institution is expected to meet the actual interests and abilities of its students and admitted

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[16] The district court found that the women's gymnastics team had won the Ivy League championship in 1989-90 and was a "thriving university-funded varsity team prior to the 1991 demotion;" that the donor-funded women's fencing team had been successful for many years and that its request to be upgraded to varsity status had been supported by the athletics director at the time; that the donor-funded women's ski team had been consistently competitive despite a meager budget; and that the club-status women's water polo team had demonstrated the interest and ability to compete at full varsity status. *Cohen III*, 879 F. Supp. at 190.

students."). Under these circumstances, the district court's finding that there are interested women able to compete at the university-funded varsity level, *Cohen III*, 879 F. Supp. at 212, is clearly correct.

Finally, the tremendous growth in women's participation in sports since Title IX was enacted disproves Brown's argument that women are less interested in sports for reasons unrelated to lack of opportunity. *See, e.g.*, Mike Tharp et al., *Sports crazy! Ready, set, go. Why we love our games*, U.S. News & World Report, July 15, 1996, at 33-34 (attributing to Title IX the explosive growth of women's participation in sports and the debunking of "the traditional myth that women aren't interested in sports").

Brown's relative interests approach is not a reasonable interpretation of the three-part test. This approach contravenes the purpose of the statute and the regulation because it does not permit an institution or a district court to remedy a gender-based disparity in athletics participation opportunities. Instead, this approach freezes that disparity by law, thereby disadvantaging further the underrepresented gender. Had Congress intended to entrench, rather than change, the status quo—with its historical emphasis on men's participation opportunities to the detriment of women's opportunities—it need not have gone to all the trouble of enacting Title IX.

V.

In the first appeal, this court rejected Brown's Fifth Amendment equal protection challenge to the statutory scheme. *Cohen II*, 991 F.2d at 900-901. Here, Brown argues that its challenge is to the decision of the district court. As Brown puts it, "[t]he [equal protection] violation arises from the court's holding that Title IX requires the imposition of quotas, preferential treatment, and disparate treatment in the absence of a compelling state interest and a determination that the remedial measure

is 'narrowly tailored' to serve that interest." Reply Br. at 18 (citing *Adarand*, —— U.S. at ——, 115 S. Ct. at 2117).

A.

To the extent that Brown challenges the constitutionality of the statutory scheme itself, the challenge rests upon at least two erroneous assumptions: first, that *Adarand* is controlling authority on point that compels us, not only to consider Brown's constitutional challenge anew, but also to apply strict scrutiny to the analysis; second, that the district court's application of the law in its liability analysis on remand is inconsistent with the interpretation expounded in the prior appeal. We reject both premises.[17] Brown's implicit reliance on *Adarand* as contrary intervening controlling authority that warrants a departure from the law of the case doctrine is misplaced because, while *Adarand* does make new law, the law it makes is wholly irrelevant to the disposition of this appeal, and, even if *Adarand* did apply, it does not mandate the level of scrutiny to be applied to gender-conscious government action.

In rejecting Brown's equal protection claim, the *Cohen II* panel stated, "It is clear that Congress has broad powers under the Fifth Amendment to remedy past discrimination." 991 F.2d at 901. The panel cited as authority *Metro Broadcasting*, 497 U.S. at 565-66 (for the proposition that "Congress need not make specific findings of discrimination to grant race-conscious relief"), and

[17] We assume, without deciding, that Brown has not waived its equal protection claim and has standing to raise it. Appellees argue that this claim is waived because Brown did not raise it in the district court. Appellee's Br. at 55 (citing *Desjardins* v. *Van Buren Community Hosp.*, 969 F.2d 1280, 1282 (1st Cir. 1992)). Appellees also argue that, to the extent that the equal protection claim is viable, Brown lacks standing to raise it. Appellee's Br. at 56 (citing *Powers* v. *Ohio*, 499 U.S. 400, 111 S. Ct. 1364, 1370-71 (1991)). Given our disposition of this claim, we do not address these arguments.

Califano v. *Webster*, 430 U.S. at 317 (noting that *Webster* upheld a social security wage law that benefitted women "in part because its purpose was 'the permissible one of redressing our society's longstanding disparate treatment of women' "). *Cohen II*, 991 F.2d at 901. The panel also noted that, in spite of the scant legislative history regarding Title IX as it applies to athletics, Congress heard a great deal of testimony regarding discrimination against women in higher education and acted to reverse the Supreme Court's decision in *Grove City College* v. *Bell*, 465 U.S. 555, 573-74 (1984) (holding that Title IX was "program-specific" and thus applied only to those university programs that actually receive federal funds and not to the rest of the university), with athletics prominently in mind. *Cohen II*, 991 F.2d at 901.

In *Metro Broadcasting*, the Court upheld two federally mandated race-based preference policies under intermediate scrutiny. 497 U.S. at 564-65 (holding that benign race-conscious measures mandated by Congress "are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives"). The *Metro Broadcasting* Court applied intermediate scrutiny, nothwithstanding that the previous year; in *Croson*, 488 U.S. 469, the Court applied strict scrutiny in striking down a municipal minority set-aside program for city construction contracts. The *Metro Broadcasting* Court distinguished *Croson*, noting that "[i]n fact, much of the language and reasoning in *Croson* reaffirmed the lesson of *Fullilove*[18] that race-

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[18] In *Fullilove*, a plurality of the Court applied a standard subsequently acknowledged to be intermediate scrutiny, *see Metro Broadcasting*, 497 U.S. at 564, in upholding against a Fifth Amendment equal protection challenge a benign race-based affirmative action program that was adopted by an agency at the explicit direction of Congress. The *Fullilove* plurality inquired "whether the *objectives* of th[e] legislation are within the power of Con-

conscious classifications adopted by Congress to address racial and ethnic discrimination are subject to a different standard than such classifications prescribed by state and local governments." *Metro Broadcasting*, 497 U.S. at 565.

Adarand overruled *Metro Broadcasting* to the extent that *Metro Broadcasting* is inconsistent with *Adarand*'s holding that "all racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny." *Adarand*, —— U.S. at ——, 115 S. Ct. at 2113. Brown impliedly assumes that *Adarand*'s partial overruling of *Metro Broadcasting* invalidates the prior panel's disposition of Brown's equal protection challenge by virtue of its passing citation to *Metro Broadcasting*. This assumption is erroneous because the proposition for which *Cohen II* cited *Metro Broadcasting* as authority has not been vitiated by *Adarand*, is of no consequence to our disposition of the issues raised in this litigation, and is, in any event, unchallenged here.[19]

The prior panel rejected Brown's Fifth Amendment equal protection[20] and "affirmative action" challenges to the statutory scheme. *Cohen II*, 991 F.2d at 901 (finding

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gress[]" and "whether the limited use of racial and ethnic criteria . . . is a constitutionally permissible *means* for achieving the congressional objectives." 488 U.S. at 473.

[19] *Cohen II* cited *Metro Broadcasting* for a general principle regarding Congress's broad powers to remedy discrimination, a proposition that was not reached by *Adarand*. Moreover, *Webster*, which *Cohen II* cited along with *Metro Broadcasting*, was not overruled or in any way rendered suspect by *Adarand*.

[20] It is well settled that the reach of the equal protection guarantee of the Fifth Amendment Due Process Clause—the basis for Brown's equal protection claim—is coextensive with that of the Fourteenth Amendment Equal Protection Clause. *E.g.*, *United States* v. *Paradise*, 480 U.S. at 166 n.16; *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975).

no constitutional infirmity, assuming *arguendo*, that the regulation creates a classification somewhat in favor of women). Thus, to the extent that Brown challenges the statutory scheme itself, that challenge is foreclosed under the law of the case doctrine. Nevertheless, the remedy ordered for a violation of a federal anti-discrimination statute is still subject to equal protection review, assuming that it constitutes gender-conscious government action. *See Miller*, —— U.S. at ——, 115 S. Ct. at 2491. Therefore, we review the constitutionality of the district court's order requiring Brown to comply with Title IX by accommodating fully and effectively the athletics interests and abilities of its women students. Because the challenged classification is gender-based, it must be analyzed under the intermediate scrutiny test. Before proceeding to the analysis, however, we must first address Brown's challenge to the standard of review.

Brown concedes that *Adarand* "does not, in partially overruling *Metro Broadcasting*, set forth the proper standard of review for this case." Appellant's Br. at 29. Nevertheless, Brown asserts that "[w]hile *Adarand* is a case involving racial classification, its analysis clearly applies to gender classification as well." *Id.* at 27. Further, inappropriately relying on *Frontiero*, 411 U.S. 677, and *Croson*, 488 U.S. 469, Brown concludes that strict scrutiny applies to gender-based classifications.[21] Appellant's

[21] In *Frontiero*, a plurality of the Court concluded that gender-based classifications, "like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny." 411 U.S. at 688. In the 23 years that have since elapsed, this position has never commanded a majority of the Court, and has never been adopted by this court. Whatever may be the merits of adopting strict scrutiny as the standard to be applied to gender-based classifications, it is inappropriate to suggest, as Brown does, that *Frontiero* compels its application here.

Brown's assertion that *Adarand* obligates this court to apply *Croson* to its equal protection claim is also incorrect. As noted

Br. at 29; Reply Br. at 19-20. These conclusory assertions do not comport with the law in this circuit.

First, as explained earlier, *Adarand* and *Croson* apply to review of legislative affirmative action schemes. This case presents the issue of the legality of a federal district court's determination, based upon adjudicated findings of fact, that a federal anti-discrimination statute has been violated, and of the statutory and constitutional propriety of the judicial remedy ordered to provide redress to plaintiffs with standing who have been injured by the violation.

Second, *Adarand* does not even discuss gender discrimination, and its holding is limited to explicitly race-based classifications. —— U.S. at ——, 115 S. Ct. at 2113. It can hardly be *assumed* that the Court intended to include gender-based classifications within *Adarand*'s precedential scope or to elevate, *sub silentio*, the level of scrutiny to be applied by a reviewing court to such classifications.

Third, even if *Adarand* did apply, it does not dictate the level of scrutiny to be applied in this case, as Brown concedes. For the last twenty years, the Supreme Court has applied intermediate scrutiny to all cases raising equal protection challenges to gender-based classifications, including the Supreme Court's most recent gender discrim-

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previously, *Croson* is an affirmative action case and does not control review of a judicial determination that a federal anti-discrimination statute has been violated. To the extent that Brown assumes that Croson governs the issue of the sufficiency of the factual predicate required to uphold a federally mandated, benign race- or gender-based classification, that assumption is also unfounded. As we have explained, *Croson*'s factual concerns are not raised by a district court's determination—predicated upon duly adjudicated factual findings bearing multiple indicia of reliability and specificity—of gender discrimination in violaton of a federal statute. We also point out that *Adarand* did not reach the question of the sufficiency of the factual predicate required to satisfy strict scrutiny review of a congressionally mandated race-based classification.

ination case, *United States* v. *Virginia*, —— U.S. ——, 116 S. Ct. 2264 (1996) ("*Virginia*"); *see id.* at 2288 (Rehnquist, C.J., concurring in the judgment) (collecting cases).[22]

Fourth, it is important to recognize that controlling authority does not distinguish between invidious and benign discrimination in the context of gender-based classifications, as it has in the context of racial classifications. Neither this court nor the Supreme Court has drawn this distinction in the context of gender discrimination claims or held that a less stringent standard applies in cases involving benign, rather than invidious, gender discrimination. *See Hogan*, 458 U.S. at 724 & n.9 (reviewing benign gender-conscious admissions policy under intermediate scrutiny and recognizing that the analysis does not change with the objective of the classification); *accord Wygant*, 476 U.S. at 273. Thus, the analytical result would be same, even if this were an affirmative action case.

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[22] We point out that *Virginia* adds nothing to the analysis of equal protection challenges to gender-based classifications that has not been part of that analysis since 1979, long before *Cohen II* was decided. While the *Virginia* Court made liberal use of the phrase "exceedingly persuasive justification," and sparse use of the formulation "substantially related to an important governmental objective," the Court nevertheless struck down the gender-based admissions policy at issue in that case under intermediate scrutiny, —— U.S. at ——, 116 S. Ct. at 2271, 2275; *id.* at 2288 (Rehnquist, C.J., concurring in the judgment), the standard applied to gender-based classifications since 1976, when it was first announced in *Craig* v. *Boren*, 429 U.S. at 197, and the test applied in both *Metro Broadcasting* and *Webster*.

The phrase "exceedingly persuasive justification" has been employed routinely by the Supreme Court in applying intermediate scrutiny to gender discrimination claims and is, in effect, a shorthand expression of the well-established test. *See Personnel Adm'r* v. *Feeney*, 442 U.S. 256, 273 (1979); *Kirchberg* v. *Feenstra*, 450 U.S. 455, 461 (1981); *Hogan*, 458 U.S. at 724; *J.E.B.* v. *Alabama ex rel. T.B.*, 511 U.S. 127, 136-37 (1994).

Under intermediate scrutiny, the burden of demonstrating an exceedingly persuasive justification for a government-imposed, gender-conscious classification is met by showing that the classification serves important governmental objectives, and that the means employed are substantially related to the achievement of those objectives. *E.g., Hogan,* 458 U.S. at 724. Applying that test, it is clear that the district court's remedial order passes constitutional muster.

We find that the first part of the test is satisfied. The governmental objectives of "avoid[ing] the use of federal resources to support discrimnatory practices," and "provid[ing] individual citizens effective protection against those practices," *Cannon,* 441 U.S. at 704, are clearly important objectives. We also find that judicial enforcement of federal anti-discrimination statutes is at least an important governmental objective.

Applying the second prong of the intermediate scrutiny test, we find that the means employed by the district court in fashioning relief for the statutory violation are clearly substantially related to these important objectives. Intermediate scrutiny does not require that there be no other way to accomplish the objectives, but even if that were the standard, it would be satisfied—in the unique context presented by the application of Title IX to athletics.

As explained previously, Title IX as it applies to athletics is distinct from other anti-discrimination regimes in that it is impossible to determine compliance or to devise a remedy without counting and comparing opportunities with gender explicitly in mind. Even under the individual rights theory of equal protection, reaffirmed in *Adarand,* ——U.S. at ——, 115 S. Ct. at 2112 (the equal protection guarantee "protect[s] persons, not groups"), the only way to determine whether the rights of an individual athlete have been violated and what relief is necessary to remedy the violation is to engage in an explicitly gender-

conscious comparison. Accordingly, even assuming that the three-part test creates a gender classification that favors women, allowing consideration of gender in determining the remedy for a Title IX violation serves the important objective of "ensur[ing] that in instances where overall athletic opportunities decrease, the actual opportunities available to the underrepresented gender do not." *Kelley*, 35 F.3d at 272. In addition, a gender-conscious remedial scheme is constitutionally permissible if it directly protects the interests of the disproportionately burdened gender. *See Hogan*, 458 U.S. at 728 ("In limited circumstances, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened.").

Under Brown's interpretation of the three-part test, there can never be a remedy for a violation of Title IX's equal opportunity mandate. In concluding that the district court's interpretation and application of the three-part test creates a quota, Brown errs, in part, because it fails to recognize that (i) the substantial proportionality test of prong one is only the starting point, and not the conclusion, of the analysis; and (ii) prong three is not implicated unless a gender-based disparity with respect to athletics participation opportunities has been shown to exist. Where such a disparity has been established, the inquiry under prong three is whether the athletics interests and abilities of the underrepresented gender are fully and effectively accommodated, such that the institution may be found to comply with Title IX, notwithstanding the disparity.[23]

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[23] Under the three-part test, the institution may also excuse the disparity under prong two, by showing a "history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the [underrepresented gender]," 44 Fed. Reg. at 71,418, in which case the compliance inquiry ends without reaching prong three. It has been determined that Brown cannot avail itself of this defense. *See Cohen III*, 879 F. Supp. at 211.

Of course, a remedy that requires an institution to cut, add, or elevate the status of athletes or entire teams may impact the genders differently, but this will be so only if there is a gender-based disparity with respect to athletics opportunities to begin with, which is the only circumstance in which prong three comes into play. Here, however, it has not been shown that Brown's men students will be disadvantaged by the full and effective accommodation of the athletics interests and abilities of its women students.

VI.

Brown assigns error to the district court's exclusion of certain evidence pertaining to the relative athletics interests of men and women. Reviewing the district court's evidentiary rulings for abuse of discretion, *see Sinai* v. *New England Tel. and Tel. Co.*, 3 F.3d 471, 475 (1st Cir. 1993), *cert. denied*, ——U.S.——, 115 S. Ct. 597 (1994), we find none.

Brown first contends that the court erred in barring cross-examination of plaintiffs' expert Dr. Sabor on the issue of why girls drop out of sports before reaching college. Because Dr. Sabor's direct testimony did not address this issue, it was within the district court's discretion to limit cross-examination "to the subject matter of the direct examination." Fed. R. Evid. 611(b); *see Ferragama* v. *Chubb Life Ins. Co. of Am.*, 94 F.3d 26, 28 (1st Cir. 1996).

Brown also suggests that the district court's exclusion of statistical and survey data offered in support of its relative interests argument constitutes error. Although the district court excluded as full exhibits two studies, the NCAA Gender Equity Study and the results of an undergraduate poll on student interest in athletics, it nevertheless permitted Brown's experts to rely on the data contained in these two reports as a basis for their expert

opinions.[24] Because Brown's experts relied upon the excluded data in providing their opinions on the issue of a gender-based differential in student interest in athletics, the evidence was before the trier of fact and any error was, therefore, harmless. *See McDonough Power Equip., Inc.* v. *Greenwood*, 464 U.S. 548, 553 (1984) (instructing apppellate courts to "ignore errors that do not affect the essential fairness of the trial").

VII.

It does not follow from our statutory and constitutional analyses that we endorse the district court's remedial order. Although we decline Brown's invitation to find that the district court's remedy was an abuse of discretion, we do find that the district court erred in substituting its own specific relief in place of Brown's statutorily permissible proposal to comply with Title IX by cutting men's teams until substantial proportionality was achieved.

In *Cohen II* we stated that it is "established beyond peradventure that, where no contrary legislative directive appears, the federal judiciary possesses the power to grant *any* appropriate relief on a cause of action appropriately brought pursuant to a federal statute." 991 F.2d at 901 (citing *Franklin*, 503 U.S. at 70-71). We also observed, however, that "[w]e are a society that cherishes academic freedom and recognizes that universities deserve great leeway in their operations." 991 F.2d at 906 (citing *Wynne* v. *Tufts Univ. Sch. of Med.*, 976 F.2d 791, 795 (1st Cir.

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[24] Brown also contends that the district court erred in excluding the NCAA Annual Report. Appellant's Br. at 56-57. Brown merely asserts, however, that the "study was admissible under Rule 803," *id.* at 57, and offers no explanation as to how it was prejudiced by the exclusion. Accordingly, we deem the argument waived. *Ryan* v. *Royal Ins. Co. of Am.*, 916 F.2d 731, 734 (1st Cir. 1990) ("It is settled in this circuit that issues adverted to on appeal in a perfunctory manner, unaccompanied by some developed argumentation, are deemed to have been abandoned.") (citations omitted).

1992), *cert. denied*, 507 U.S. 1030 (1993); *Lamphere* v. *Brown Univ.*, 875 F.2d 916, 922 (1st Cir. 1989). Nevertheless, we have recognized that academic freedom does not embrace the freedom to discriminate. *Villanueva* v. *Wellesley College*, 930 F.2d 124, 129 (1st Cir. 1991) (citations omitted).

The district court itself pointed out that Brown may achieve compliance with Title IX in a number of ways:

> It may eliminate its athletic program altogether, it may elevate or create the requisite number of women's positions, it may demote or eliminate the requisite number of men's positions, or it may implement a combination of these remedies. I leave it entirely to Brown's discretion to decide how it will balance its program to provide equal opportunities for its men and women athletes. I recognize the financial constraints Brown faces; however, its own priorities will necessarily determine the path to compliance it elects to take.

Cohen III, 879 F. Supp. at 214; *see also Cohen II*, 991 F.2d at 898 n.15 (noting that a school may achieve compliance with Title IX by "reducing opportunities for the overrepresented gender").

With these precepts in mind, we first examine the compliance plan Brown submitted to the district court in response to its order. We then consider the district court's order rejecting Brown's plan and the specific relief ordered by the court in its place.

Brown's proposed compliance plan stated its goal as follows:

> The plan has one goal: to make the gender ratio among University-funded teams at Brown substantially proportionate to the gender ratio of the undergraduate student body. To do so, the University must disregard the expressed athletic interests of one

> gender while providing advantages for others. *The plan focuses only on University-funded sports, ignoring the long history of successful donor-funded student teams.*

Brown's Plan at 1 (emphasis added).

In its introduction, Brown makes clear that it "would prefer to maintain its current program" and that the plan submitted

> is inconsisent with Brown's philosophy to the extent that it grants advantages and enforces disadvantages upon student athletes solely because of their gender and curbs the historic role of coaches in determining the number of athletes which can be provided an opportunity to participate. Nevertheless, the University wishes to act in good faith with the order of the Court, notwithstanding issues of fact and law which are currently in dispute.

Id. at 2.

Brown states that it "seeks to address the issue of proportionality while minimizing additional undue stress on already strained physical and fiscal resources." *Id.*

The general provisions of the plan may be summarized as follows: (i) Maximum squad sizes for men's teams will be set and enforced. (ii) Head coaches of all teams must field squads that meet minimum size requirements. (iii) No additional discretionary funds will be used for athletics. (iv) Four new women's junior varsity teams—basketball, lacrosse, soccer, and tennis—will be university-funded. (v) Brown will make explicit a *de facto* junior varsity team for women's field hockey. *Id.* at 3-4.

The plan sets forth nine steps for its implementation, *id.* at 4-5, and concludes that "if the Court determines that this plan is not sufficient to reach proportionality, phase two will be the elimination of one or more men's teams," *id.* at 5.

The district court found Brown's plan to be "fatally flawed" for two reasons. First, despite the fact that 76 men and 30 women participated on donor-funded varsity teams, Brown's proposed plan disregarded donor-funded varsity teams. District Court Order at 5-6. Second, Brown's plan "artificially boosts women's varsity numbers by adding varsity positions on four women's teams." *Id.* at 6. As to the propriety of Brown's proposal to come into compliance by the addition of junior varsity positions, the district court held:

> Positions on distinct junior varsity squads do not qualify as "intercollegiate competition" opportunities under the Policy Interpretation and should not be included in defendants' plan. As noted in *Cohen*, 879 F. Supp. at 200, "intercollegiate" teams are those that "regularly participate in varsity competition." *See* 44 Fed. Reg. at 71,413 n.1. Junior varsity squads, by defintion, do not meet this criterion. Counting new women's junior varsity positions flagrantly violates the spirit and letter of Title IX; in no sense is an institution providing equal opportunity if it affords varsity positions to men but junior varsity positions to women.

District Court Order at 6 (footnote omitted).

The district court found that these two flaws in the proposed plan were sufficient to show that Brown had "not made a good faith effort to comply with this Court's mandate." *Id.* at 8.

In criticizing another facet of Brown's plan, the district court pointed out that

> [a]n institution does not provide equal opportunity if it caps its men's teams after they are well-stocked with high-caliber recruits while requiring women's teams to boost numbers by accepting walkons. A University does not treat its men's and women's teams equally if it allows the coaches of men's teams to

> set their own maximum capacity limits but overrides the judgment of coaches of women's teams on the same matter.

Id. at 8-9.

After rejecting Brown's proposed plan, but bearing in mind Brown's stated objectives, the district court fashioned its own remedy:

> I have concluded that Brown's stated objectives will be best served if I design a remedy to meet the requirements of prong three rather than prong one. In order to bring Brown into compliance with prong one under defendants' Phase II, I would have to order Brown to cut enough men's teams to eradicate approximately 213 men's varsity positions. This extreme action is entirely unnecessary. The easy answer lies in ordering Brown to comply with prong three by upgrading the women's gymnastics, fencing, skiing, and water polo teams to university-funded varsity status. In this way, Brown could easily achieve prong three's standard of "full and effective accommodation of the underrepresented sex." This remedy would entail upgrading the positions of approximately 40 women. In order to finance the 40 additional women's positions, Brown certainly will not have to eliminate as many as the 213 men's positions that would be cut under Brown's Phase II proposal. Thus, Brown will fully comply with Title IX by meeting the standards of prong three, without approaching satisfaction of the standards of prong one.
>
> It is clearly in the best interest of both the male and the female athletes to have an increase in women's opportunities and a small decrease in men's opportunities, if necessary, rather than, as under Brown's plan, *no* increase in women's opportunities and a *large* decrease in men's opportunities. Expanding

> women's athletic opportunities in areas where there is proven ability and interest is the very purpose of Title IX and the simplest, least disruptive, route to Title IX compliance at Brown.

Id. at 11-12.

The district court ordered Brown to "elevate and maintain women's gymnastics, women's water polo, women's skiing, and women's fencing to university-funded varsity status." *Id.* at 12. The court stayed this part of the order pending appeal and further ordered that, in the interim, the preliminary injunction prohibiting Brown from eliminating or demoting any existing women's varsity team would remain in effect. *Id.*

We agree with the district court that Brown's proposed plan fell short of a good faith effort to meet the requirements of Title IX as explicated by this court in *Cohen II* and as applied by the district court on remand. Indeed, the plan is replete with argumentative statements more appropriate for an appellate brief. It is obvious that Brown's plan was addressed to this court, rather than to offering a workeable solution to a difficult problem.

It is clear, nevertheless, that Brown's proposal to cut men's teams is a permissible means of effectuating compliance with the statute. Thus, although we understand the district court's reasons for substituting its own specific relief under the circumstances at the time, and although the district court's remedy is within the statutory margins and constitutional, we think that the district court was wrong to reject out-of-hand Brown's alternative plan to reduce the number of men's varsity teams. After all, the district court itself stated that one of the compliance options available to Brown under Title IX is to "demote or eliminate the requisite number of men's positions." *Cohen III*, 879 F. Supp. at 214. Our respect for academic freedom and reluctance to interject ourselves into the conduct of university affairs counsels that we give universities

as much feedom as possible in conducting their operations consonant with constitutional and statutory limits. *Cohen II*, 991 F.2d at 906; *Villaneuva*, 930 F.2d at 129.

Brown therefore should be afforded the opportunity to submit another plan for compliance with Title IX. The context of the case has changed in two significant respects since Brown presented its original plan. First, the substantive issues have been decided adversely to Brown. Brown is no longer and appellant seeking a favorable result in the Court of Appeals. Second, the district court is not under time constraints to consider a new plan and fashion a remedy so as to expedite appeal. Accordingly, we remand the case to the district court so that Brown can submit a further plan for its consideration. In all other respects the judgment of the district court is affirmed. The preliminary injunction issued by the district court in *Cohen I*, 809 F. Supp. at 1001, will remain in effect pending a final remedial order.

VIII.

There can be no doubt that Title IX has changed the face of women's sports as well as our society's interest in and attitude toward women athletes and women's sports. *See, e.g.*, Frank DeFord, *The Women of Atlanta*, Newsweek, June 10, 1996, at 62-71; Tharp, *supra*, at 33; Robert Kuttner, *Vicious Circle of Exclusion*, Washington Post, September 4, 1996, at A15. In addition, there is ample evidence that increased athletics participation opportunities for women and young girls, available as a result of Title IX enforcement, have had salutary effects in other areas of societal concern. *See* DeFord, *supra*, at 66.

One need look no further than the impressive performances of our country's women athletes in the 1996 Olympic Summer Games to see that Title IX has had a dramatic and positive impact on the capabilities of our women athletes, particularly in team sports. These

Olympians represent the first full generation of women to grow up under the aegis of Title IX. The unprecedented success of these athletes is due, in no small measure, to Title IX's beneficient effects on women's sports, as the athletes themselves have acknowledged time and again. What stimulated this remarkable change in the quality of women's athletic competition was not a sudden, anomalous upsurge in women's interest in sports, but the enforcement of Title IX's mandate of gender equity in sports. Kuttner, *supra,* at A15.

Affirmed in part, reversed in part, and remanded for further proceedings. No costs on appeal to either party.

TORRUELLA, *Chief Judge* (Dissenting). Because I am not persuaded that the majority's view represents the state of the law today, I respectfully dissent.

I. THE LAW OF THE CASE

Under the doctrine of the "law of the case," a decision on an issue of law made by the court at one stage of a case becomes a binding precedent to be followed in successive stages of the same litigation except in unusual circumstances. *See Abbadessa* v. *Moore Business Forms, Inc.*, 987 F.2d 18, 22 (1st Cir. 1993); *EEOC* v. *Trabucco*, 791 F.2d 1, 2 (1st Cir. 1986). It is well established however, that a decision of the Supreme Court, that is rendered between two appeals and is irreconcilable with the decision on the first appeal, must be followed on the second appeal. *See Linkletter* v. *Walker*, 381 U.S. 618, 627 (1965); *Metcalf & Eddy, Inc.* v. *Puerto Rico Aqueduct and Sewer Auth.*, 945 F.2d 10, 12 (1st Cir. 1991), *rev'd on other grounds*, 506 U.S. 139 (1993); *Young* v. *Herring*, 917 F.2d 858 (5th Cir. 1990); *Fogel* v. *Chestnutt*, 668 F.2d 100, 109 (2d Cir. 1981), *cert. denied*, 459 U.S. at 828 (1982). I believe that we face such a situation in the instant case.

A. *Adarand* and *Metro Broadcasting*

At the time of *Cohen* v. *Brown University*, 991 F.2d 888 (1st Cir. 1993) (*Cohen II*), the standard intermediate scrutiny test for discriminatory classifications based on sex required that "a statutory classification must be substantially related to an important government objective." *Clark* v. *Jeter*, 486 U.S. 456, 461 (1988); *see also Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 723-24, and n.9 (1982); *Mills* v. *Habluetzel*, 456 U.S. 91, 99 (1982); *Craig* v. *Boren*, 429 U.S. 190, 197 (1976); *Matthews* v. *Lucas*, 427 U.S. 495, 505-06 (1976). As was also the case under strict scrutiny review prior to

Adarand Construction Inc. v. *Pena*, ——U.S. ——, 115 S. Ct. 2097 (1995), however, courts applying intermediate scrutiny sometimes allowed "benign" gender classifications on the grounds that they were a "reasonable means of compensating women as a class for past . . . discrimination." Ronald D. Rotunda & John E. Novack, 3 *Treatise on Constitutional Law* § 18.23, at 277; *see Califano* v. *Webster*, 430 U.S. 313-317 (1977) (allowing women to compute certain social security benefits with a more favorable formula than could be used by men); *Lewis* v. *Cohen*, 435 U.S. 948 (1978) (summary affirmance of a district court decision upholding a provision of the Railroad Retirement Act that allowed women to retire at age 60 while men could not retire until age 65).

In *Cohen II*, we applied precisely this type of benign-classification analysis to what we viewed to be benign gender discrimination by the federal government. Although *Cohen II*, in its brief discussion of the equal protection issue, does not specify the precise standard it used, the court stated that "even if we were to assume . . . that the regulation creates a gender classification slanted somewhat in favor of women, we would find no constitutional infirmity." *Cohen II*, 991 F.2d at 901. Note that the focus is on the government's ability to favor women in this context, rather than on an "important government objective," suggesting that the court considered the issue to be one of benign discrimination. Indeed, no governmental interest is even identified in *Cohen II*. Furthermore, both of the cases cited by the court in *Cohen II* are cases in which a suspect classification was allowed because it was judged benign, *see id.* at 901 (citing *Metro Broadcasting Inc.* v. *FCC*, 497 U.S. 547 (1990) (race); *Califano* v. *Webster*, 430 U.S. 313 (1977) (sex)).

Cohen II's assumption that a regulation slanted in favor of women would be permissible, *Cohen II* 991 F.2d at 901, and by implication that the same regulation would

be impermissible if it favored men, was based on *Metro Broadcasting*, which held that benign race-based action by the federal government was subject to a lower standard than non-remedial race-based action. *See Metro Broadcasting*, 497 U.S. at 564. Specifically, the Supreme Court announced that

> benign race-conscious measures mandated by Congress are constitutionally permissible *to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives.*

Id. at 565 (emphasis added). Although *Metro Broadcasting* explicitly discussed race-conscious rather than gender-conscious classifications, we applied its standard in *Cohen II*. *See Cohen II*, 991 F.2d at 901.

Since *Cohen II*, however, *Metro Broadcasting* has been overruled, at least in part. *See Adarand Constr. Inc.* v. *Pena*, ——U.S.——, ——, 115 S. Ct. 2097, 2111-12 (1995). In *Adarand*, the Supreme Court held that "all racial classifications . . . must be analyzed under strict scrutiny." *Adarand*, 115 S. Ct. at 2113. The Court in *Adarand* singled out *Metro Broadcasting* as a "significant departure" from much of the Equal Protection jurisprudence that had come before it, in part because it suggested that "benign" government race-conscious classifications should be treated less skeptically than others. *See Adarand*, 115 S. Ct. at 2112.

In *Adarand*, the Supreme Court reasoned that " 'it may not always be clear that a so-called preference is in fact benign.' " *Id.* (quoting *Regents of Univ. of Cal.* v. *Bakke*, 438 U.S. 265 (1978) (opinion of Powell, J.)). Additionally, the Supreme Court endorsed the view that

> [a]bsent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign'

> or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.

Id. at 2112; *see also Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

It is not necessary to equate race and gender to see that the logic of *Adarand*—counseling that we focus on the categories and justifications proffered rather than the labels attached— applies in the context of gender. While cognizant of differences between race-focused and gender-focused Equal Protection precedent, I nevertheless think that *Adarand* compels us to view so-called "benign" gender-conscious governmental actions under the same lens as any other gender-conscious governmental actions. *See Adarand,* 115 S. Ct. at 2112; *see also United States* v. *Virginia,* 116 S.Ct. 2264, 2274, 2277 (1996)) (viewing Virginia's benign justification for a gender classification skeptically); *Shuford* v. *Alabama State Bd. of Educ.,* 897 F. Supp. 1535. 1557 (D. Ala. 1995) (stating that courts "must look behind the recitation of a benign purpose to ensure that sex-based classifications redress past discrimination"). Rather than conduct an inquiry into whether Title IX and its resulting interpretations are "benign" or "remedial," and conscious of the fact that labels can be used to hide illegitimate notions of inferiority or simple politics just as easily in the context of gender as in the context of race, we should now follow *Adarand*'s lead and subject all gender-conscious government action to the same inquiry.[25]

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[25] Our discussion in *Cohen II* also cited *Califano* v. *Webster,* 430 U.S. 313 (1977), which has not been explicitly overruled. That case concerned Congress' provision, under the Social Security Act, for a lower retirement age for women than for men, with the result that, as between similarly situated male and female wage-earners, the female wage-earner would be awarded higher monthly social security payments, *id.* at 314-16. In that case, Congress specifically found that more frequent and lower age limits were

B. *United States* v. *Virginia*

A second Supreme Court case has also made it necessary to review our decision in *Cohen II*. In *United States* v. *Virginia*, 116 S.Ct. 2264 (1996), the Court faced an Equal Protection challenge to Virginia's practice of maintaining the Virginia Military Institute as an all male institution. Rather than simply apply the traditional test requiring that gender classifications be "substantially related to an important government objective," *Clark* v. *Jeter* 486 U.S 456, 461 (1988), the Supreme Court applied a more searching "skeptical scrutiny of official action denying rights or opportunities based on sex," *id.*, at 2274, which requires that "[p]arties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action," *id.* In its discussion, the Court stated that, in order to prevail in a gender case, "the State must show *at least* that the challenged and that the discriminatory means employed are substantially related to the achievement of those objectives." *Id.* at 2275 (internal quotations omitted) (emphasis added). Being "substantially related to an important government objective," therefore, is considered a necessary but not sufficient condition. The Court also requires a focus on "whether the proffered justification is "exceedingly persuasive." *Id.*

Virginia "drastically revise[d] our established standards for reviewing sex-based classifications." *Id.* at 2291

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being applied to women than to men in the labor market. *Id.* at 319. This led the Supreme Court to characterize the provision at issue as remedial rather than benign, noting that the provision had been repealed in 1972, roughly contemporaneously with "congressional [antidiscrimination] reforms [that] . . . have lessened the economic justification for the more favorable benefit computation" for women. *Id.* at 320. The instant case should be distinguished from *Califano* for two reasons. First, *Califano* did not necessarily rule on benign classifications, as *Metro Broadcasting* and *Adarand* clearly did. Second, *Califano*, unlike the instant case, contained an "exceedingly persuasive justification" for its gender-conscious state action.

(Scalia, J. dissenting). "Although the Court in two places . . . asks whether the State has demonstrated that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives . . . the Court proceeds to interpret 'exceedingly persuasive justification' in a fashion that contradicts the reasoning of *Hogan* and our other precedents." *Id.*

What is important for our purposes is that the Supreme Court appears to have elevated the test applicable to sex discrimination cases to require an "exceedingly persuasive justification." This is evident from the language of both the majority opinion and the dissent in *Virginia.*

This is not just a matter of semantics. *Metro Broadcasting,* and our application of its intermediate scrutiny standard in *Cohen II,* omitted the additional "skeptical scrutiny" requirement of an "exceedingly persuasive justification" for gender-based government action. *Compare Virginia,* 116 S.Ct. at 2274 (citing *J.E.B.* v. *Alabama ex rel. T.B.,* 511 U.S 127, 136-37, and n.6 (1994)), and *Mississippi Univ. for Women* v. *Holden,* 458 U.S. 718, 724 (1982), *with Metro Broadcasting,* 497 U.S. at 564-65.

I conclude, therefore, that *Adarand* and *Virginia* are irreconcilable with the analysis in *Cohen II* and, accordingly, we must follow the guidance of the Supreme Court in this appeal. Under the new standards established in those cases, *Cohen II* is flawed both because it applies a lenient version of intermediate scrutiny that is impermissible following *Adarand* and because it did not apply the "exceedingly persuasive justification" test of *Virginia.* We must, as Brown urges, reexamine the Equal Protection challenge to the three-prong test as interpreted by the district court.

C. Preliminary Injunction

In addition to the above reasons for considering the merits of this appeal, it is important to note that *Cohen II* was an appeal from a preliminary injunction. "When an appeal comes to us in that posture, the appellate court's conclusions as to the merits of the issues presented on preliminary injunction are to be understood as statements of probable outcomes, rather than as comprising the ultimate law of the case." *A.M. Capen's Co.* v. *American Trading and Prod. Co.*, 74 F.3d 317, 322 (1st Cir. 1996) (internal quotations omitted); *see also Narrangansett Indian Tribe* v. *Gilbert*, 934 F.2d 4, 6 (1st Cir. 1991).

The binding authority of *Cohen II*, therefore, is lessened by the fact that it was an appeal from a preliminary injunction. First, we now have a full record before us and a set of well-defined legal questions presented by the appellant. Trial on the merits has served to focus these questions and to provide background that allows us to consider these questions in the proper context and in detail. In its decision in *Cohen II*, this court recognized and, indeed, emphasized the fact that its holding was only preliminary. *Cohen II*, 991 F.2d at 902 ("a party losing the battle on likelihood of success may nonetheless win the war at a succeeding trial"). Rather than turning that ruling into a permanent one, we should review the question in light of the full set of facts now available.

Second, the standard of review has changed. The *Cohen II* court stated that it was adopting a deferential standard of review, and that "if . . . the district court made no clear error of law or fact, we will overturn its calibration . . . only for manifest abuse of discretion." *Id.* at 902. The test applied by the court was based on "(1) the movant's probability of victory on the merits; (2) the potential for irreparable harm if the injunction is refused; (3) the balance of interests as between the parties . . . and (4) the public interest." *Id.* The case is now before us on appeal

from the merits and we must review it accordingly. For the purposes of this appeal, we must review findings of fact under a clearly erroneous standard, *Reich* v. *Newspapers of New England, Inc.*, 44 F.3d 1060, 1069 (1st Cir. 1995) and findings of law *de novo*, *Portsmouth* v. *Schlesinger*, 57 F.3d 12, 14 (1st Cir. 1995). Because the standard has changed, it is conceivable that the result of the analysis will change, making review appropriate.

II. BROWN'S EQUAL PROTECTION CHALLENGE

Appellees have argued that the three-prong test does not create a gender classification because the classification applies to both women and men. Although I agree that by its words, the test would apply to men at institutions where they are proportionately underrepresented in intercollegiate athletics, I cannot accept the argument that, via this provision, the Government does not classify its citizens by gender. *See United States* v. *Virginia*, —— U.S. ——, 116 S. Ct. 2264, 2274-76 (1996) (applying Equal Protection review to "gender-based government action" where Commonwealth of Virginia attempted to maintain two purportedly equal single-sex institutions). *Cf. Loving* v. *Virginia*, 388 U.S. 1, 8-9 (1967) (stating that even though the statute at issue applied equally to members of different racial classifications, it still implicated race-related Equal Protection concerns, since the statute itself contained race-conscious classifications). The fact of gender-conscious classification, even with equal enforcement with respect to both genders, requires the application of a higher level of scrutiny than rational basis review. We cannot pretend that an interpretation of a statute that contains explicit categorization according to gender and that has intentional gender-conscious effect does not represent gender-based government action. Equal Protection is implicated where the claim is made that a classification made by the government intentionally subjects an individual to treatment different from similarly situated individuals based on an impermissible characteris-

tic, such as race, national origin, or gender. Ronald D. Rotunda & John E. Nowak, 3 *Treatise on Constitutional Law* § 18.2, at 7-8 (2d ed. 1992).

A. The District Court's Construction of the Three-Prong Test

1. Prong One

A central issue in this case is the manner in which athletic "participation opportunities" are counted. During the 1990-91 academic year, Brown fielded 16 men's and 15 women's varsity teams on which 566 men and 328 women participated. By the 1993-94 year, there were 12 university-funded men's teams and 13 university funded women's teams. These teams included 479 men and 312 women. Based on an analysis of membership in varsity teams, the district court concluded that there existed a disparity between female participation in intercollegiate athletics and female student enrollment.

Even assuming that membership numbers in varsity sports is a reasonable proxy for participation opportunities —a view with which I do not concur—contact sports should be eliminated from the calculus. The regulation at 34 C.F.R. § 106.41(b) (1995) provides that an academic instruction may operate separate teams for members of each sex "where selection of such teams is based upon competitive skill or the activity involved is a contact sport." 34 C.F.R. § 106.41(b). When a team is sponsored only for one sex, however, and where "athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered *unless the sport involved is a contact sport*," *id.* (emphasis added). The regulation, therefore, allows schools to operate single-tax teams in contact sports. In counting participation opportunities, therefore, it does not make sense to include in the calculus athletes participating in contact sports that include only

men's teams. For example, if a university chooses to sponsor a football team, it is permitted to sponsor only a men's team. Not all sports are the same and the university should be given the flexibility to determine which activities are most beneficial to its student body. By including in its accounting a contact sport that requires very large numbers of participants, e.g., football, the district court skews the number of athletic participants—making it impossible for the university to provide both men's and women's teams in other sports.

If the athletes competing in sports for which the university is permitted to field single-sex teams are excluded from the calculation of participation rates, the proportion of women participants would increase dramatically and prong one might be satisfied. If so, the inquiry ends and Brown should be judged to be in compliance.

2. Prong Two

The district court concluded, and the majority appears to agree, that Brown failed to satisfy prong two because "merely reducing program offerings to the overrepresented gender does not constitute program expansion for the underrepresented gender." Majority Opinion at 18. This is a curious result because the entire three-prong test is based on *relative* participation rates. Prong one, for example, requires that participation opportunities be provided proportionately to enrollment, but does not mandate any absolute number of such opportunities. The district court's conclusion with respect to prong two, however, implies that a school must not only demonstrate that the proportion of women in their program is growing over time, it must also show that the *absolute* number of women participating is increasing.[26]

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[26] This requirement presents a dilemma for a school in which women are less interested in athletics, as Brown contends is the case. Under such conditions, a school may be unable to succeed under the second prong because there may not be enough interested

Under the district court's interpretation, a school facing budgetary constraints must, in order to comply with prong two, *increase* the opportunities available to the underrepresented gender, even if it cannot afford to do so. Rather than respecting the school's right to determine the role athletics will play in the future—including reducing the opportunities available to the formerly overrepresented gender to ensure proportionate opportunities—the district court and the majority demand that the *absolute* number of opportunities provided to the underrepresented gender be increased. I see no possible justification for this interpretation—the regulation is intended to protect against discrimination, not to promote athletics on college campuses. A school is not required to sponsor an athletic program of any particular size. It is not for the courts, or the legislature, for that matter, to mandate programs of a given size. The most that can be demanded is that athletics be provided in a non-discriminatory manner.

Furthermore, the claim that a reduction in the opportunities given to the overrepresented gender is an unacceptable method of coming into compliance with the three prong test is contrary to both *Cohen II* and comments of the majority opinion. The majority quotes approvingly from *Cohen* v. *Brown Univ.*, 879 F. Supp. 185 (D.R.I. 1995) (*Cohen III*), to demonstrate the many ways in which a university might achieve compliance:

> It may eliminate its athletic program altogether, it may elevate or create the requisite number of women's positions, it may demote or eliminate the requisite number of men's positions, or it may implement a combination of these remedies.

Majority Opinion at 70 (quoting *Cohen III*). This conclusion is consistent with *Cohen II*, which states that a

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female students to achieve a continuing increase in the number of female participants.

school may achieve compliance by reducing opportunities for the overrepresented gender. *See Cohen II*, 991 F.2d at 898 n.15. I fail to see how these statements can be reconciled with the claim that Brown cannot satisfy prong two by reducing the number of participation opportunities for men.

3. Prong Three

Prong Three of the three-prong test states that, where an institution does not comply with prongs one or two, compliance will be assesed on the basis of

> whether it can be demonstrated that the interests and abiilties of the members of th[e] [proportionately underrepresented] sex have been fully and effectively accommodated by the present program.

44 Fed. Reg. 71,413, 71,418 (December 11, 1979).

According to the district court, Brown's athletics program violates prong three because members of the proportionately underrepresented sex have demonstrated interest sufficient for a university-funded varsity team that is not in fact being funded. The district court asserts that this is not a quota. Brown, on the other hand, argues that prong three is satisfied when (1) the interests and abilities of members of the proportionately underrepresented gender (2) are accommodated to the same degree as the proportionatly overrepresented gender.

Th district court's narrow, literal interpretation should be rejected because prong three cannot be read in isolation. First, as Brown points out, the Regulation that includes prong three provides that, in assessing compliance under the regulation, "the governing principle in this area is that the *athletic interests and abilities of male and female students be equally effectively accommodated.*" *Policy Interpretation*, 44 Fed. Reg. 71,413, 71,414. Thus, Brown contends, to meet "fully"—in an absolute sense—the interests and abilities of an underrepresented gender,

while unmet interest among the overrepresented gender continues, would contravene the governing principle of "equally effective accommodat[ion]" of the interests and abilities of students of both genders.

It is also worthwhile to note that to "fully" accommodate the interests and abilities of the underrepresented sex is an extraordinarily high—perhaps impossibly so—requirement. How could an academic institution with a large and diverse student body ever "fully" accommodate the athletic interests of its students? Under even the largest athletic program, it would be surprising to find that there is not a single student who would prefer to participate in athletics but does not do so because the school does not offer a program in the particular sport that interests the student. To read fully in an absolute sense would make the third prong virtually impossible to satisfy and, therefore, an irrelevant addition to the test.

This difficulty was recognized in *Cohen II*, which stated that "the mere fact that there are some female students interested in a spot does not *ipso facto* require the school to provide a varsity team in order to comply with the third benchmark." *Cohen II* 991 F.2d at 898. The balance that *Cohen II* advocates would require the institution to ensure "participatory opportunities . . . when, and to the extent that, there is sufficient interest and ability among the members of the excluded sex to sustain a viable team." *Id.* (internal citations omitted). This standard may be practical for certain sports that require large teams, but what of individual sports? A "viable" tennis team may require only a single player. The same could be said of any individual sport, including golf, track and field, cycling, fencing, archery, and so on. Therefore, we still have the problem that to "fully accommodate" the interests of the underrepresented sex may be impossible under the district court's interpretation.

In light of the above, Brown argues that prong three is in fact ambiguous with respect to whether "fully"

means (1) an institution must meet 100% of the underrepresented gender's unmet reasonable interest and ability, or (2) an institution must meet the underrepresented gender's unmet reasonable interest and ability as fully as it meets those of the overrepresented gender. I agree with Brown that, in the context of OCR's Policy Interpretation, prong three is susceptible to at least these two plausible interpretations.

Additionally, section 1681(a), a provision enacted by Congress as part of Title IX itself, casts doubt on the district court's reading of prong three. 20 U.S.C. § 1681 (a) (1988). As Brown points out, Title IX, of which the Policy Interpretation is an administrative interpretation, contains language that prohibits the ordering of preferential treatment on the basis of gender due to a failure of a program to substantially mirror the gender ratio of an institution. Specifically, with respect to Title IX's guarantee that no person shall be excluded on the basis of sex from "participation in, denied the benefits of or subjected to discrimination under any education program or activity receiving Federal financial assistance," 20 U.S.C. § 1681(a),

> [n]othing contained [therein] shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of the sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number of percentage of persons of that sex in any community.

Id. § 1681(b). Section 1681(b) provides yet another reason why the district court's reading of prong three is troublesome and why Brown's reading is a reasonable alternative.

Since the application regulation, 34 C.F.R. § 106.41, and policy interpretation, 44 Fed. Reg. 71,418, are not

manifestly contrary to the objectives of Title IX, and Congress has specifically delegated to an agency the responsibility to articulate standards governing a particular area, we must accord the ensuing regulation considerable deference. *Chevron, U.S.A.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). That notwithstanding, where—as here—the resulting regulation is susceptible to more than one reaosnable interpretation, we owe no such deference to the interpretation chosen where the choice is made not by the agency but by the district court. Therefore, like other cases of statutory interpretation, we should review the district court's reading *de novo*.

B. The District Court's Interpretation and the Resulting Equal Protection Problem

The district court's interpretation of prongs one and three creates an Equal Protection problem, which I analyze in two steps. First, the district court's interpretation creates a quota scheme. Second, even assuming such a quota scheme is otherwise constitutional, appellees have not pointed to an "exceedingly persuasive justification," *see Virginia*, 116 at 2274, for this particular quota scheme.

1. The Quota

I believe that the three prong test, as the district court interprets it, is a quota. I am in square disagreement with the majority, who believe that "[n]o aspect of the Title IX regime at issue in this case . . . mandates gender-based preferences or quotas." Majority Opinion at 29. Put another way, I agree that "Title IX is not an affirmative action statute," *id.*, but I believe that is exactly what the district court has made of it. As interpreted by the district court, the test constitutes an affirmaive action, quota-based scheme.

I am less interested in the actual term "quota" than the legally cognizable characteristics that render a quota

scheme impermissible. And those characteristics are present here in spades. I am not persuaded by the majority's argument that the three-part test does not constitute a quota because it does not permit an agency or court to find a violation solely on the basis of prong one of the test; instead, an institution must also fail prongs two and three. As Brown rightly argues, the district court's application of the three-prong test requires Brown to allocate its athletic resources to meet the as-yet-unmet interest of a member of the underrepresented sex, women in this case, while simultaneously neglecting any unmet interest among individuals of the overrepresented sex. To the extent that the rate of interest in athletics diverges between men and women at any institution, the district court's interpretation would require that such an institution treat an individual male student's athletic interest and an individual female student's athletic interest completely differently: one student's reasonable interest would have to be met, *by law*, while meeting the other student's interest would only aggravate the lack of proportionality giving rise to the legal duty. "The injury in cases of this kind is that a 'discriminatory classification prevent[s] . . . competition on an equal footing.'" *Adarand*, 115 S. Ct. at 2104 (quoting *Northeast Fla. Chapter, Assoc'd Gen'l Contractors of America* v. *Jacksonville*, 508 U.S. 656, 666 (1993)). As a result, individual male and female students would be precluded from competing against each other for scarce resources; they would instead compete only against members of their own gender. *Cf. Hopwood* v. *Texas*, 78 F.3d 932, 943-46 (5th Cir.) (concluding that not only would government action precluding competition between individuals of different races for law school admissions be unconstitutional, but in fact even partial consideration of race among other factors would be unconstitutional), *cert. denied*, 116 S.Ct. 2581 (1996).[27]

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[27] In response, appellees cite *Kelley* v. *Board of Trustees*, 35 F.3d 265, 271 (1994), for the proposition that the three-prong test does

The majority claims that "neither the Policy Interpretation nor the district court's interpretation of it, *mandates* statistical balancing." Majority Opinion at 41. The logic of this position escapes me. A school can satisfy the test in three ways. The first prong is met if the school provides participation opportunities for male and female students in numbers substantially proportionate to their enrollments. This prong surely requires statistical balancing. The second prong is satisfied if an institution that cannot meet prong one can show a "continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of the underrepresented sex." 44 Fed. Reg. at 71,418. It can hardly be denied that this prong requires statistical balancing as it is essentially a test that requires the school to show that it is moving in the direction of satisfying the first prong. Establishing that a school is moving inexorably closer to satisfying a requirement that demands statistical balancing can only be done by demonstrating an improvement in the statistical balance. In other words, the second prong also requires balancing. Finally, the third prong, interpreted as the majority advocates, dispenses with statistical balancing only because it choose to accord zero weight to one side of the balance. Even a single person with a reasonable unmet interest defeats

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not constitute a quota, because it does not "require any educational institution to grant preferential or disparate treatment" to the gender underrepresented in that institution's athletic program. *Id.* However, in *Kelley*, the Seventh Circuit, unlike the district court, did not use the three-prong test as a definitive test for liability. Rather, the Seventh Circuit endorsed the test as one for compliance in *dismissing the plaintiff's* claims. The Seventh Circuit did not consider the question of whether, had the defendant University of Illinois *not* been in compliance, lack of compliance with the three-prong test *alone* would trigger automatic liability, nor did the Seventh Circuit spell out what steps would have been required of defendant. At any rate, *Kelley* pre-dates the Supreme Court's opinions in *Adarand* and *Virginia*, meaning that it suffers from the same defects as *Cohen II*.

compliance. This standard, in fact, goes farther than the straightforward quota test of prong one. According to the district court, the unmet interests of the underrepresented sex must be *completely* accommodated before *any* of the interest of the overrepresented gender can be accommodated.[28]

A pragmatic overview of the effect of the three-prong test leads me to reject the majority's claim that the three-prong test does not amount to a quota because it involves multiple prongs. In my view it is the result of the test, and not the number of steps involved, that should determine if a quota system exists. Regardless of how many steps are involved, the fact remains that the test requires proportionate participation opportunities for both sexes (prong one) unless one sex is simply not interested in participating (prong three). It seems to me that a quota with an exception for situations in which there are insufficient interested students to allow the school to meet it remains a quota. All of the negative effects of a quota remain,[29] and the school can escape the quota under prong

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[28] The problem with the majority's argument can be illustrated with a hypothetical college admissions policy that would require proportionality between the gender ratio of the local student aged population and that of admitted students. This policy is comparable to prong one of the three prong test and is, without a doubt, a quota. It is no less a quota if an exception exists for schools whose gender ratio differs from that of the local population but which admit every applicant of the underrepresented gender. It remains a quota because the school is forced to admit every female applicant until it reaches the requisite proportion. Similarly, the district court's interpretation requires the school to accommodate the interests of every female student until proportionality is reached.

[29] Nor does the second prong of the test change the analysis. That prong merely recognizes that a school may not be able to meet the quotas of the first or third prong immediately, and therefore deems it sufficient to show program expansion that is responsive to the interests of the underrepresented sex.

three only by offering preferential treatment to the group that has demonstrated less interest in athletics.

2. "Extremely Persuasive Justification" Test

In view of the quota scheme adopted by the district court, and Congress' specific disavowal of any intent to require quotas as part of Title IX, appellees have not met their burden of showing an "exceedingly persuasive justification" for this gender-conscious exercise of government authority. As recently set forth in *Virginia*, "[p]arties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action." *Virginia*, 116 S.Ct. at 2274. While the Supreme Court in *Virginia* acknowledged that "[p]hysical differences between men and women . . . are enduring," *id.* at 2276, it went on to state that such " '[i]nherent differences' between men and women, we have come to appreciate, remain cause for celebration, but not for . . . artificial constraints on an individual's opportunity." *Id.*

Neither appellees nor the district court have demonstrated an "exceedingly persuasive justification" for the government action that the district court has directed in this case. In fact, appellees have failed to point to *any* congressional statement or indication of intent regarding a proportional representation scheme as applied by the district court. While they point to Congress' decision to delegate authority to the relevant agencies, this does not amount to a genuine—that is, not hypothesized or invented in view of litigation, *id.* at 2275—exceedingly persuasive justification in light of section 1681(b)'s "no quota" provision. We are left with the explanations discussed in *Cohen II* to the effect that Congress conducted hearings on the subject of discrimination against women in education. There is little more than that, because Congress adopted Title IX as a floor amendment without committee hearings or reports. *See Cohen II*, 991 F.2d at 893.

I believe that the district court's interpretation of the Policy Interpretation's three-prong test poses serious constitutional difficulties. "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, [we] construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988); *see NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979). To the extent that Congress expressed a specific intent germane to the district court's interpretation, Congress, if anything, expressed an aversion to quotas as a method to enforce Title IX. As a result, I opt for Brown's construction of prong three, which, as we have discussed, *infra*, is also a reasonable reading.

Accordingly, I would reverse and remand for further proceedings.

III. EVIDENTIARY ISSUES

In disputes over the representation of women in athletic programs, it is inevitable that statistical evidence will be relevant. There is simply no other way to assess participation rates, interest levels, and abilities. The majority opinion, however, offers inconsistent guidance with respect to the role of statistics in Title IX claims. Early in the opinion, the majority approvingly cites to the statistical evaluations conducted in *Cohen I*, *Cohen II*, and *Cohen III*. Majority Opinion at 8-10. The figures in question demonstrate that women's participation in athletics is less than proportional to their enrollment. Later in the opinion, however, when the level of interest among women at Brown is at issue, the court adopts a much more critical attitude towards statistical evidence: "[T]here exists the danger that, rather than providing a true measure of women's interest in sports, statistical evidence purporting to reflect women's interest instead provides only a measure of the very discrimination that is and has been the basis

for women's lack of opportunity." Majority Opinion at 53. In other words, evidence of differential levels of interest is not to be credited because it may simply reflect the result of past discrimination.

The refusal to accept surveys of interest levels as evidence of interest raises the question of what indicators might be used. The majority offers no guidance to a school seeking to assess the levels of interest of its students. Although the three-prong test, even as interpreted by the district court, appears to allow the school the opportunity to show a lack of interest, the majority rejects the best—and perhaps the only—mechanism for making such a showing.

Brown claims that the district court erred in excluding evidence pertaining to the relative athletic interests of men and women at the university. Brown sought to introduce the NCAA Gender Equity Study and the results of an undergraduate poll on student interest in athletics, but was not permitted to do so. The majority is unsympathetic to Brown's claim that the disparity between athletic opportunities for men and women reflect a gender-based difference in interest levels. Indeed, despite Brown's attempt to present evidence in support of its claim, the majority characterizes Brown's argument as an "unproven assertion." Majority Opinion at 51.[30]

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[30] Among the evidence submitted by Brown are: (i) admissions data showing greater athletic interest among male applicants than female applicants; (ii) college board data showing greater athletic interest and prior participation rates by prospective male applicants than female applicants; (iii) data from the Cooperative Institutional Research Program at UCLA indicating greater athletic interest among men than women; (iv) an independent telephone survey of 500 randomly selected Brown undergraduates that reveals that Brown offers women participation opportunities in excess of their representation in the pool of interested, qualified students; (v) intramural and club participation rates that demonstrates higher participation rates among men than women; (vi) walk-on and try-out numbers that reflect a greater interest among men

Furthermore, the majority recognizes that institutions are entitled to use any nondiscriminatory method of their choosing to determine athletic interests. Majority Opinion at 53 n.15. If statistical evidence of interest levels is not to be considered by courts, however, there is no way for schools to determine whether they are in compliance. Any studies or surveys they might conduct in order to assess their own compliance would, in the event of litigation, be deemed irrelevant. Regardless of the efforts made by the academic institution, the spector of a lawsuit would be ever-present.

In addition, the majority has put the power to control athletics and the provision of athletic resources in the hands of the underrepresented gender. Virtually every other aspect of college life is entrusted to the institution, but athletics has now been carved out as an exception and the university is no longer in full control of its program. Unless the two genders participate equally in athletics, members of the underrepresented sex would have the ability to demand a varsity level team at any time if they can show sufficient interest. Apparently no weight is given to the sustainability of the interest, the cost of the sport, the university's view on the desirability of the sport, and so on.

IV FIRST AMENDMENT ISSUE

Finally, it is important to remember that Brown University is a private institution with a constitutionally protected First Amendment right to choose its curriculum. Athletics are part of that curriculum. Although the protections of the First Amendment cannot be used to justify discrimination, this court should not forget that it has a

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than women; (vii) high school participation rates that show a much lower rate of participation among females than among males; (viii) the NCAA Gender Equity Committee data showing that women across the country participate in athletics at a lower rate than men.

duty to protect a private institution's right to mould its own educational environment.

The majority pays lip service to these concerns in the final pages of its long opinion, stating that " 'we are a society that cherishes academic freedom and recognizes that universities deserve great leeway in their operations.' " Majority Opinion at 69 (quoting *Cohen II*, 991 F.2d at 906), and "[O]ur respect for academic freedom and reluctance to interject ourselves into the conduct of university affairs counsels that we give universities as much freedom as possible." Majority Opinion at 75. Despite these statements, however, the majority in its opinion today, and the district court before it, have failed to give Brown University freedom to craft its own athletic program and to choose the priorities of that program. Instead, they have established a legal rule that straightjackets college athletics programs by curtailing their freedom to choose the sports they offer.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

C.A. No. 92-2483

AMY COHEN, *et al.*, each individually and on behalf of all others similarly situated,
Plaintiffs,

v.

BROWN UNIVERSITY, VARTAN GREGORIAN, and DAVID ROACH,
Defendants.

OPINION AND ORDER

PETTINE, RAYMOND J., Senior U.S. District Judge

I. INTRODUCTION

This is a class action lawsuit charging Brown University, its president, and its athletic director (collectively "Brown") with violating Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 (1988) ("Title IX").[1] Specifically, the plaintiff class, which consists of all present and future Brown University women students and potential students who participate, seek to participate, and/or are deterred from participating in intercollegiate athletics funded by Brown, contends that defendants have discriminated against women in the op-

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[1] Title IX applies only to those institutions that receive federal financial assistance. 20 U.S.C. § 1681. Brown University receives federal funds and is therefore required to comply with Title IX.

eration of Brown's intercollegiate athletic program. After carefully considering the legal arguments and evidence presented throughout the thirty day trial on the merits, I find Brown University to be in violation of Title IX.

This suit was initiated in response to the demotion of the women's gymnastics and volleyball teams at Brown from full varsity to club varsity status in May of 1991. Up until that time, both teams were fully funded by the University. At the same time that Brown demoted these two women's teams, and apparently in an effort to comply with its understanding of Title IX's directives, Brown also demoted two men's fully funded varsity teams, water polo and golf, to club varsity status. At that time, all four teams were stripped of their university funding and most of their varsity privileges.[2] Plaintiffs allege that, against a background in which men at Brown already enjoyed a disproportionately large share of the resources expended on athletics and of the intercollegiate participation opportunities afforded to student athletes, the facially even-handed demotions perpetuated Brown's discriminatory treatment of women.

Prior to the trial on the merits, this Court granted plaintiffs' motion for class certification and denied defendants' motion to dismiss. This Court subsequently heard fourteen days of testimony on plaintiffs' motion for a preliminary injunction. I ordered that the women's gymnastics and volleyball teams be reinstated to fully funded varsity status and prohibited Brown from eliminating or reducing the status or funding of any existing women's

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[2] Financial considerations prompted the demotions. Brown expected to save $77,823 per year as a result of these reductions. Most of the savings realized by eliminating the funding for the four teams came from the women's athletic budget. Brown saved 62,028 by demoting the women's volleyball and gymnastics teams and $15,795 by demoting the men's golf and water polo teams. However, the status reductions did not appreciably affect the athletic participation gender ratio.

intercollegiate varsity team until the case was resolved on the merits. *Cohen v. Brown Univ.*, 809 F.Supp. 978 (D.R.I. 1992). "After mapping Title IX's rugged legal terrain and cutting a passable swath through the factual thicket that overspreads the parties' arguments," the First Circuit affirmed *Cohen v. Brown Univ.*, 991 F.2d 888, 891 (1st Cir. 1993).

At the time of the preliminary injunction, there was virtually no case law on point. Since issuance of the First Circuit's opinion, a number of other circuits have been faced with Title IX athletic discrimination suits. *See, e.g., Horner v. Kentucky High Sch. Athletic Ass'n.*, 43 F.3d 265 (6th Cir. 1994); *Kelley v. Board of Trustees*, 35 F.3d 265 (7th Cir. 1994), *cert. denied*, 115 S.Ct. 938 (1995); *Favia v. Indiana Univ. of Pennsylvania*, 7 F.3d 332 (3d Cir. 1993); *Roberts v. Colorado State Bd. of Agriculture*, 998 F.2d 824 (10th Cir.), *cert. denied*, 114 S.Ct. 580 (1993). The Third, Sixth, Seventh, and Tenth Circuits are in agreement with the First Circuit's interpretation of the law and relevant agency documents. These developments have been explored in a number of recent law review articles.[3] In the instant case, defendants have

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[3] *See, e.g.*, Jennifer L. Henderson, *Gender Equity in Intercollegiate Athletics: A Commitment to Fairness*, 5 Seton Hall J. Sport L. 133 (1995); Janet Judge et al., Perspective, *Gender Equity in the 1990s: An Athletic Administrator's Survival Guide to Title IX and Gender Equity Compliance*, 5 Seton Hall J. Sport L. 313 (1995); Diane Heckman, *The Explosion of Title IX Legal Activity in Intercollegiate Athletics During 1992-93: Defining the "Equal Opportunity" Standard*, 1994 Det. C.L. Rev. 953 (1994); Teresa M. Miguel, *Title IX and Gender Equity in Intercollegiate Athletics: Case Analyses, Legal Implications, and the Movement Toward Compliance*, 1 Sports Law. J. 279 (1994); B. Glenn George, *Miles to Go and Promises to Keep: A Case Study in Title IX*, 64 U. Colo. L. Rev. 555 (1993); William E. Thro & Brian A. Snow, *Cohen v. Brown University and the Future of Intercollegiate and Interscholastic Athletics*, 84 Ed. Law Rep. 611 (1993); Jill K. Johnson, Note, *Title IX and Intercollegiate Athletics: Current*

advanced several provocative arguments that require a thorough examination of the relevant law. In addition, the unusual two-tiered structure of Brown's intercollegiate athletic program presents a unique factual situation requiring this Court to engage in an exhaustive analysis of Title IX and its regulatory complements.

First, I will chronicle the factual background of this case. Second, I will address several preliminary matters. Third, I will outline the legal framework of Title IX and the implementing regulations and interpretation. Fourth, I will review the degree of deference due these agency documents. Fifth, I will set forth this Court's interpretation of the law and will explain why the alternative interpretation offered by counsel must be rejected. Finally, I will discuss the specifics of this case in light of my legal conclusions.

II. FACTUAL BACKGROUND

Brown University is a Division I institution within the National Collegiate Athletic Association ("NCAA"). As

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Judicial Interpretation of the Standards for Compliance, 74 B.U. L. Rev. 553 (1994); R. Lindsay Marshall, Case Comment, *Cohen v. Brown University: The First Circuit Breaks New Ground Regarding Title IX's Application to Intercollegiate Athletics*, 28 Ga. L. Rev. 837 (1994); Mary Beth Petriella, Note, *Injunctive Relief—Title IX—Interim Preliminary Injunction Reinstating Varsity Status to Demoted Collegiate Athletic Teams is Available When That Team Alleges a Title IX Violation and Litigation is Pending —Cohen v. Brown . . .*, 4 Seton Hall J. Sport L. 595 (1994); *Catherine Pieronek, Note, A Clash of Titans: College Football v. Title IX*, 20 J.C. & U.L. 351 (1994); and William H. Webb, Jr., Case Comment, *Sports Law—Cohen v. Brown University: The Promulgation of Gender Equity in Intercollegiate Athletics*, 25 U. Mem. L. Rev. 351 (1994).

The defendants submitted one such piece for my consideration with their post trial memoranda. Walter B. Connolly, Jr. & Jeffrey D. Adelman, *A University's Defense to a Title IX Gender Equity in Athletics Lawsuit: Congress Never Intended Gender Equity Based on Student Body Ratios*, 71 U. Det. Mercy L. Rev. 845 (1994). This Court, however, can hardly accept as authoritative a law review article co-written by defense counsel.

such, Brown participates at the highest level of NCAA competition.[4] Brown currently offers an extensive athletic program for its students.[5] At the intercollegiate level it funds 13 sports for women and 12 sports for men. Additionally, it recognizes, but does not fund, several sports as "donor-funded" varsities (four men's teams and three women's teams).[6] Although the number of varsity sports offered to men and women are equal, the selection of sports offered to each gender generates far more individual positions for male athletes than for female athletes.

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[4] Brown football, however, is a Division I-AA sport and therefore participates at the second highest level of NCAA competition.

[5] Defendants repeatedly point to the fact that Brown's program offerings for women exceed the national average of women's sports per intsitution. However, Brown also exceeds the national average of men's sports per institution. The fact that Brown's athletic offerings are "extensive" cannot and does not excuse its failure to comply with Title IX. That other universities may be even more clearly in violation of Title IX's nondiscrimination mandate does not exonerate an institution that still provides unequal opportunities to its own male and female students.

[6] This "intermediate" program level has been in flux since its inception. Both the name and the treatment of these teams have changed over the last three years. In May 1991 the demoted teams were labeled "club varsity" teams. The athletic director announced that the four teams would no longer receive funds from the Univirsity but would continue to be treated in all other ways as a varsity team. The teams would remain eligible for NCAA competition if they continued to comply with NCAA requirements and if they were able to raise the funds to maintain a sufficient level of competitiveness. During the next season, however, it became apparent that "club varsities" were not receiving the same unviersity privileges as "true" varsities. In December of 1991, the athletic director decided that the term "club varsity" was misleading and changed it to "intercollegiate club" in order to avoid misleading prospective student-athletes. By the time of trial, both the treatment and name of the intermediate teams had further evolved. Brown restored some of the traditional varsity privileges to these teams and now refers to them as "donor-funded," "gift-funded," or "unfunded" varsities. For ease of reference, I will use the term "donor-funded" varsity.

Brown provides the financial resources to sustain the budgets of the "university-funded" varsities, whereas it requires donor-funded teams to raise their own funds through private donations in order to exist. Brown also provides certain services and privileges to the university-funded varsities but not to the donor-funded varsities.[7]

A consequence of this two-tiered system is that most donor-funded varsities have found it difficult to maintain a level of competitiveness as high as their ability would otherwise permit. Their competitive disadvantage in comparison to university-funded teams is due, in part, to the reluctance of some schools to include donor-funded teams in their varsity schedules[8] and in part to the inability of the teams to obtain varsity-level coaching[9] and re-

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[7] While Brown, since the end of the 1993-94 season, has decided to provide donor-funded varsities with access to the weight and training rooms and with special admissions considerations, it is not yet clear to what extent all of these varsity advantages will actually be provided to donor-funded varsities on the *same* basis as they are provided to university-funded varsities. For example, free trainer services are not always available to donor-funded and university-funded varsity teams on an equal basis. Brown does not provide donor-funded varsities with other university amenities, such as office space, campus telephone privileges, secretarial support, and possibly laundry facilities and free interterm housing.

More importantly, Brown also does not guarantee that donor-funded teams will have coaching, equipment and supplies, money for travel (including meals and lodging) and for post-season competition. Brown guarantees all of the above to its university-funded varsities.

[8] For instance, when volleyball was originally demoted, two schools called to cancel their competitions with Brown because of the team's demotion. The volleyball coach also cancelled one tournament because she was unsure if the team would be able to raise enough money to afford the trip. Prelim. Inj. Hr'g Tr. 11/2/92 at 138-39.

[9] The women's ski team, for example, during the 1993-94 season could only afford to hire one coach to train the men's and women's ski teams two nights a week and another to show up for competi-

cruits,[10] or to obtain funds for travel,[11] post-season com-

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tions. Currently, the donor-funded women's ski team can only afford to contribute $1,000 toward coach's compensation; the men's club ski team will match this amount, and the two teams will share the coach. The team captain is responsible for any other training the team does. Trial Tr. 9/29/94 at 11-12, 22, 31.

Similarly, the gymnastics team, in the absence of the preliminary injunction, would have been drastically underfunded. The gymnastics team has never been able to raise close to the amount of money required to retain its coach at her current salary, much less to meet other operating expenses of the team. *See* Trial Tr. 9/27/94 at 171.

[10] Eileen Rocchio, a member of the gymnastics team, testified that she "wouldn't have come to Brown unless [she] knew that it was a varsity team." Prelim. Inj. Hr'g Tr. 10/28/92 at 137. *See also* Prelim. Inj. Hr'g Tr. 10/29/92 at 19-20 ("I would never have gone to Brown knowing and . . . having to worry about fund raising and lockers and . . . trainers and not getting to fulfill my potential as . . . an athlete. Those are things that I . . . would go to a school so that they could provide me with, not that I would have to worry about finding them on my own").

The inability to recruit team members of a high caliber greatly affects the competitive level of a team. For example, when the volleyball team was demoted and lost its recruiting appeal, the team had no alternative but to accept far less accomplished athletes, and it effectively ceased to exist as a varsity level team. Trial Tr. 9/29-94 at 188-90.

[11] Elliot Lilien, former head coach and current assistant coach of men's and women's fencing testified as follows:

> Q: So did you consider the amount of finances that you had in picking a schedule and deciding which teams against which to compete?
>
> A: Sure.
>
> . . .
>
> A: Now if we were to aim at a higher level of competition, no, we didn't have enough [funds] then. (Trial Tr. 9/27/94 at 102).
>
> . . .
>
> A: I've always thought Brown was a gold mine for fencing and if there was sufficient commitment made to it, Brown

petition [12] and equipment.[13]

Extensive testimony demonstrated that several donor-funded teams do have the interest and ability to compete at the top varsity level and would benefit from university-funded status. I find that the donor-funded women's gymnastics, women's fencing, and women's ski teams have demonstrated this interest and ability. The women's gymnastics team was a thriving university-funded varsity team prior to the 1991 demotion; in fact, the team won the Ivy League championship in 1989-90. *See, e.g.*, testimony of Athletic Director Roach, Prelim. Inj. Hr'g Tr. 11/4/92 at 86 (acknowledging that at the time gymnastics was demoted, the team had the interest and ability to compete at the varsity level). The women's fencing team has been successful for many years against a number of club and

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could compete with anyone in the country. (Trial Tr. 9/27/94 at 104).

See also Trial Tr. 9/27/94 at 31-33 (fencing team did not join Ivy League round robin due to insufficient commitment from Brown; team could not compete successfully in the round robin without coaching, travel allotments and practice space comparable to that afforded to the other teams participating in that league).

[12] Gymnast was unable to attend the NCAA Eastern Regional Championships due to team's financial constraints. Prelim. Inj. Hr'g Tr. 10/29/92 at 18.

[13] The captain of the women's ski team testified, for example, that the gates the team uses in practice have not been replaced in over ten years due to the team's lack of funds. "[I]f they break, we're in big trouble because we have no money to replace any of our training gates. So we would be at a loss, a big loss if one of the gates breaks which is very plausible." Trial Tr. 9/29/94 at 34.

A coach of the women's fencing team expressed similar concerns about the team's limited access to electric equipment. He explained that "electric weapons are somewhat differently weighted and feel differently [from conventional weapons]." Trial Tr. 9/27/94 at 107. Electric equipment is used in competition, but the team "seldom used electric equipment in practice because of the fear that it would break and [the team] wouldn't be able to—to replace it." Trial Tr. 9/27/94 at 20.

varsity competitors, and, prior to the demotions, John Parry, who was the athletic director at that time, supported the team's request to be upgraded to varsity status. Prelim. Inj. Hr'g Tr. 10/27/92 at 122-26. Despite a meager budget, the women's ski team has consistently fielded a competitive team in the U.S. Collegiate Ski Association Osborne Division. *See* Trial Tr. 9/28/94 at 12-14 (head coach of Smith College women's varsity ski team testifying to strength and stability of the Brown University women's ski team).

Additionally, women's water polo, a club team, has demonstrated the interest and ability to compete at the highest varsity level.[14] The women's water polo team, according to the coach of men's and women's water polo, is able to compete at a varsity level. *See* Trial Tr. 10/3/94 at 65 (testifying to varsity ability and schedule of the women's water polo team). *See also* Trial Tr. 10/5/94 at 18-20 (head coach of Slippery Rock University men's and women's varsity water polo teams testifying to stability and achievements of Brown University women's water polo team).

I also find that although all four teams would benefit from university-funded varsity status, only two of these teams, volleyball and skiing, would be able to sustain a competitive intercollegiate varsity schedule if supported at donor-funded status. The testimony demonstrated that gymnastics would effectively cease to exist as an intercollegiate varsity team if it were denied university funding. The gymnastics team does not attract enough private donations to afford quality coaching. *See supra* note 9. In addition, a donor-funded gymnastics team will draw less talented individuals to the team, which will, as a

[14] This is a non-inclusive list; there may be other women's club sports with sufficient interest and ability to warrant elevation to varsity status. Plaintiffs, however, did not introduce any substantial evidence at trial to prove the existence of other women's club teams meeting the criteria.

result, suffer competitively. The testimony also established that elevation of women's water polo, currently a club team, to donor-funded status would actually be financially disadvantageous for the team. As a club sport, the team currently receives $3000 from the Student Activities organization; as a donor-funded sport, the team would be required to raise all of its own funds. Trial Tr. 10/3/94 at 26.

In *Cohen, I* summarized the history of athletics at Brown University:

> Nearly all of the men's varsity teams were established before 1927. Baseball was created first in 1869, followed by football in 1878 and track in 1879. The only men's teams established after 1927 were crew in 1961, water polo in 1974 [elevated to varsity in 1981], and squash in 1989 [provided with varsity services but fully endowed through private donations]. By comparison, virtually all of the women's varsity teams were created between 1971 and 1977. The only women's varsity team created after this period was winter track in 1982. Before 1971, all women's sports were operated out of a separate athletic program at Pembroke College, a subunit of Brown University until its merger with Brown College during that year. Before the merger, the women's athletic program at Pembroke bore no resemblance to the program which Brown provided to its male varsity athletes. While Pembroke did have few intercollegiate teams (e.g., field hockey, basketball, tennis), the women's program received very little financial or institutional support from the university.

Cohen, 809 F.Supp. at 981.

At the present time, Brown's intercollegiate athletic program [15] consists of 32 teams. The list of varsity teams

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[15] For a complete definition of intercollegiate athletics as defined by the relevant agency document, see *infra* part VI.A.1.a.

and their respective participants for the last complete season (1993/94), with program offering updates, are as follows: [16]

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[16] Although the 1994/95 season has already started, with new program offerings in place, I have chosen to use data from 1993/94 to calculate participation numbers. The 1994/95 participation numbers are necessarily incomplete and unreliable given that Spring sports had not yet begun at the close of the trial. However, the lists below do reflect the 1994/95 upgrade in status of women's volleyball to university-funded varsity and women's skiing to donor-funded varsity. I have used this combination of 1993/94 number and 1994/95 program offerings in order to reflect most accurately the current program.

I derived the 1993/94 participation numbers from the NCAA Squad Lists, Pls.' Ex. 32, which I find to be the most accurate, if imperfect, representation of varsity participants available. These lists are maintained by the athletic department and periodically updated by team coaches. I did not include student-athletes who either quit or were cut from the team, except where the change occurred very late in the season. I did, however, count participants marked as injured under the assumption that they remained team members.

I decline to rely upon the NCAA Sport Sponsorship Forms submitted to the NCAA by the athletic department at the end of the year. Joan Taylor, Brown's Associate Athletic Director and the Senior Women's Administrator, testified that the number of varsity participants on the sponsorship forms is a rough figure "because the N.C.A.A.'s reason for this form is only to make sure that we have at least met the minimum criteria for Division I sport sponsorship." Trial Tr. 10/3/94 at 169. The NCAA Squad Lists, on the other hand, report on the individual eligibility of each member of the team. For that reason, the NCAA Squad Lists, unlike the NCAA Sports Sponsorship Forms, list the names of individual athletes, thus permitting verification of team particpation numbers. The Squad Lists are maintained by the athletic department and are updated periodically throughout the season.

WOMEN		MEN	
University-funded		*University-funded*	
Basketball:	12	Baseball:	30
Crew:	50	Basketball:	17
Cross-Country:	18	Crew:	45
Field Hockey:	36	Cross-Country:	20
Ice Hockey:	22	Football:	126
Lacrosse:	34	Ice Hockey:	41
Soccer:	22	Lacrosse:	44
Softball:	15	Soccer:	32
Squash:	15	Swimming:	24
Swimming:	27	Tennis:	12
Tennis:	10	Track:	56
Track:	39	Wrestling:	32
Volleyball [17]:	09		
Donor-funded		*Donor-funded*	
Fencing:	10	Fencing:	26
Gymnastics [18]:	10	Golf:	14
Skiing [19]	09	Squash:	15
		Water polo:	21

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[17] During the 1994/95 season Brown guaranteed the volleyball team university-funded varsity status for the next five years.

[18] Gymnastics is currently supported as a university-funded team as required by court order. However, in the absence of this order, Brown has acknowledged that it would demote gymnastics to donor-funded status. *See* Trial Tr. 11/21/94 at 25. I therefore include gymnastics as a donor-funded team.

It is arguable that gymnastics should be counted only as a club team because the testimony demonstrated that gymnastics would, within a few seasons, effectively cease to exist as an intercollegiate varsity team if it were denied university funding.

[19] Women's skiing was upgraded in 1994/95 to donor-funded status. Prior to this season, the athletic department did not maintain an NCAA Squad List for the team because the team was a club sport. I therefore rely on the 1994/95 NCAA Squad List to count ski team participants.

Miscellaneous [20]			
Men's Golf:	01		
Men's Crew:	03		
Total women varsity:	342	Total men varsity:	555

I find that 342 women (38.13% of athletes) and 555 men (61.87% of athletes) were members of varsity teams for the majority of the last complete season and therefore count as "participants" in intercollegiate athletics for the purpose of Title IX analysis.

Defendants argue that there is no consistent measure of actual participation rates because team size varies throughout the athletic season. Defendants observe that injuries, "cuts," and "quits" result in different team numbers depending on when in the season team rosters are tallied. Counting the number of participants at the end of the last complete season, rather than at some arbitrary point in the season, addresses this concern. A team member who participated for the majority of the season should be acknowledged as a participant. Once the season is over, it is possible to assess which of the individuals listed on the roster at the beginning of the season remained team members.

Defendants further argue that there is no consistent measure of actual participation rates because there are alternative definitions of "participant" that yield very different participation totals. For instance, a "participant" could be defined to include every member of the team, even habitual "bench-warmers," or to include only "core" players. Including as "participants" all of the students who were members of the team for a majority of the season addresses this concern. Where both the athlete

[20] There are four women who participate on men's teams: three female coxswains on the men's crew team and a female golfer on the men's golf team.

and coach determine that there is a place on the team for a student, it is not for this Court to second-guess their judgment and impose its own, or anyone else's, definition of a valuable or genuine varsity experience. It is the nature of a team that each student makes a different contribution to the team's success and takes from it a unique experience. *Every* varsity team member is therefore a varsity "participant."

Thus, in 1993/94, there were 897 student athletes participating in varsity athletics. Of this total, 555 (61.87%) were men and 342 (38.13%) were women. During that same year, the undergraduate enrollment was 5722 students; this included 2796 men (48.86%) and 2926 women (51.14%). Pls.' Ex. 33.

III. PRELIMINARY MATTERS

A. Partial Settlement of the Case

On December 16, 1994, during the course of the trial on the merits, this Court entered a Settlement Agreement and Stipulation of Dismissal in Regard to Equality of Treatment ("Settlement Agreement"). The agreement settled plaintiffs' allegations that significant disparities exist in the relative financial support of and benefits given to men's and women's university-funded varsity teams.[21] The treatment issues settled by this agreement concern only university-funded varsity teams as to which there is no dispute regarding status and does not preclude consideration by the Court of any evidence relevant to issues in contention. Thus, the instant Opinion and Order focuses primarily on planitiffs' alternative claim that significant disparities exist in the number of intercollegiate participation opportunities available to men and those available to women. Therefore, in assessing Brown's compliance with Title IX, I will address whether the Univer-

[21] The treatment of men's and women's teams addressed by the Settlement Agreement is governed by 34 C.F.R. § 106.41(c)(2)-(10). *See infra* part IV.B.

sity accommodates effectively "the interests and abilities of students to the extent necessary to provide equal opportunity in the selection of sports and levels of competition available to members of both sexes." Policy Interpretation, 44 Fed. Reg. 71,413, at 71,417 (1979). In addition, this Opinion and Order deals briefly with the treatment of teams as to which there is a dispute concerning status.

B. The Precedential Effect of the First Circuit's Preliminary Injunction Ruling

Brown has advanced the argument that any findings of fact and conclusions of law made by the First Circuit during the preliminary injunction phase of this case are not binding on this Court's ruling on the merits. They note that "[a] preliminary injunction is 'by its very nature, interlocutory, tentative, provisional, ad interim, impermanent, mutable, not fixed or final or conclusive, characterized by its for-the-time-beingness.' " Defs.' Mem. of Law Re Law of the Case at 2 (quoting *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 742 (2d Cir. 1953)). Further, they reason that a court confronted with different facts, arguments, and issues may reach different conclusions about legal standards or statutory and regulatory interpretations. Defs.' Reply Mem. Re Law of the Case at 3. During the trial on the merits, defendants urged this Court to find that it had the authority to disregard the interpretation of Title IX adopted by the First Circuit in upholding the preliminary injunction issued by this Court.

Defendants are correct that the factual determination set forth in *Cohen*, 809 F.Supp. 978, and upheld by the First Circuit on appeal are not binding on the decision currently before me. Similarly, this Court is not bound by the First Circuit's application of the law to the facts then in evidence. It is well-settled that at the preliminary injunction stage, an appellate court's " 'findings' and

'holdings' as to the merits of the case are not final but should be understood to be merely statements of probable outcomes based on the record as it existed before the district court." *LeBeau v. Spirito*, 703 F.2d 639, 643 (1st Cir. 1983) (citing *Planned Parenthood League of Mass. v. Bellotti*, 641 F.2d 1006, 1009 (1st Cir. 1981)).

Defendants incorrectly extend this general principle to support their position that this Court is not bound to follow the First Circuit's legal pronouncement. A district court is not free to determine anew issues of law already presented to and decided by the appellate court. Statements of law made by an appellate court, whether set forth in an opinion reviewing a preliminary injunction or in an opinion reviewing the outcome of a trial on the merits, become the law of the circuit and, as established precedent, bind the district courts.[22]

In any case, the question is academic because this Court is in accord with the First Circuit's interpretation of Title IX as set forth in *Cohen*, 991 F.2d 888. Nothing in the record before me, now fully developed, undermines the considered legal framework established by the First Circuit at the preliminary injunction stage. However, the existence of new facts and legal arguments presented at trial does require a full examination of and expansion upon the foundations laid by the First Circuit.

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[22] District and circuit courts commonly accord appellate court pronouncements of law rendered in reviewing preliminary injunctions precedential value *sub silentio*. For example, *Planned Parenthood League of Mass. v. Bellotti*, 641 F.2d 1006 (1st Cir. 1981) considered a district court's denial of a preliminary injunction and has been relied upon by district courts and by the Court of Appeals. *See, e.g., Massachusetts v. Secretary of Health and Human Servs.*, 899 F.2d 53, 66 (1st Cir. 1990) (stating "[t]he regulations also run afoul of our holding in [*Bellotti*], in which we invalidated a twenty-four hour waiting period requirement contained in a Massachusetts statute regulating abortions"), *vacated and remanded sub nom. Sullivan v. Massachusetts*, 500 U.S. 949 (1991); and *Women's Medical Center of Providence, Inc. v. Roberts*, 530 F.Supp. 1136, 1143, 1145, 1147, 1149, 1150-51, 1153 (D.R.I. 1982).

Naturally, as defendants contend, to the extent that the appellate court has not been presented with and has not decided any legal issue now material to the case, this Court must interpret the law without the benefit of guidance from the appellate court.

IV. LEGAL FRAMEWORK

A. Title IX

The text of Title IX does not expilictly prohibit gender discrimination in athletics. Rather, Title IX is a general prohibition of sex discrimination in all aspects of educational institutions receiving federal funding:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance [with exemptions not applicable to this case].

20 U.S.C. § 1681(a). In order for this prohibition to apply to an institution's athletic programs, the athletic department need not be the direct recipient of federal funding; rather it is well-settled that Title IX applies to all of an institution's programs if *any* part of an educational institution receives federal funds. *Cohen,* 809 F.Supp. at 982-83 (citations omitted).

In addition, Title IX specifies that its proscription of gender discrimination in athletics should not be "interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of [a gender] imbalance" between the persons participating in the program and the total number of persons in the relevant community. 20 U.S.C. § 1681(b). However, subsection (b) also provides that it "shall not be construed to prevent the consideration in any . . . proceeding . . . of statistical evidence tending to show that

such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex." 20 U.S.C. § 1681(b). Thus, Title IX "does not mandate strict numerical equality between the gender balance of a college's athletic program and the gender balance of its student body." *Cohen*, 991 F.2d at 894. The practical effect of subsection (b) is that:

> [A] court assessing Title IX compliance may not find a violation *solely* because there is a disparity between the gender composition of an educational institution's student constituency, on the one hand, and its athletic programs, on the other hand.
>
> That is not to say, however, that evidence of such disparity is irrelevant. Quite the contrary: under the proviso contained in section 1681(b), a Title IX plaintiff in an athletic discrimination suit must accompany statistical evidence of disparate impact with some further evidence of discrimination, such as unmet need amongst the members of the disadvantaged gender.

Cohen, 991 F.2d at 895. Thus, evidence of gender imbalance in Brown's athletic programs is relevant to a determination of non-compliance but not sufficient by itself to mandate a finding of Title IX violation.

B. Regulations

The U.S. Department of Education ("DED") acting through its Office of Civil Rights ("OCR") is responsible for administering Title IX.[23] Pursuant to the statutory

[23] For the shift in agency responsibility for Title IX administration, see *Cohen*, 991 F.2d at 895 (describing the shift of authority from Health Education and Welfare ("HEW") to its successor agency, DED, when HEW was split into the Department of Health and Human Services ("HHS") and DED). The regulations and the Policy Interpretation discussed below were originally promul-

mandate, DED promulgated regulations controlling "Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance." 34 C.F.R. § 106 (1994). The regulations specifically address athletic program administration at 34 C.F.R. §§ 106.37(c)[24] and 106.41.

Paralleling the language of Title IX, section 106.41(a) states:

> No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

34 C.F.R. § 106.41(a). The regulations go on to clarify, however, that institutions are permitted to "operate or sponsor separate teams for members of each sex" under certain circumstances detailed therein. 34 C.F.R. § 106.41(b).

Section 106.41(c), entitled "Equal Opportunity," addresses the most critical issue in this case. Regardless of what teams, if any, an institution offers, its athletic program must afford equal opportunities to male and female athleties. The section reads, in pertinent part:

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gated by HEW, in 1975 and 1979, respectively. For the purposes of this discussion, however, I will refer to DED as the promulgating agency "because the agency adopted the very same regulation which the Policy Interpretation was issued to interpret." *Horner*, 43 F.3d at 273 n.6 (citing *Cohen v. Brown Univ.*, 991 F.2d 888, 896 n.10 (1st Cir. 1993)).

[24] This provision governs the distribution of athletic scholarships under the general caption of financial assistance in education programs. Brown University, as an Ivy League institution, does not grant athletic scholarships to its students. Therefore, section 106.37(c) is not at issue in this case, and I do not address it.

In determining whether equal opportunities are available the Director will consider, among other factors:

(1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;

(2) The provision of equipment and supplies;

(3) Scheduling of games and practice time;

(4) Travel and per diem allowance;

(5) Opportunity to receive coaching and academic tutoring;

(6) Assignment and compensation of coaches and tutors;

(7) Provision of locker rooms, practice and competitive facilities;

(8) Provision of medical and training facilities and services;

(9) Provision of housing and dining facilities and services;

(10) Publicity.

34 C.F.R. § 106.41(c). The trial on the merits focused on the first of these ten factors, the "effective accommodation" element. The other nine factors concern "treatment issues," which were settled by the parties only as to equivalence between men's and women's teams voluntarily maintained by Brown at the university-funded level. *See* discussion *supra part* III.A.

C. Policy Interpretation

Several years after the regulations were promulgated, DED's Office of Civil Rights [25] proposed a policy interpre-

[25] At the time the Policy Interpretation was originally published, the Office of Civil Rights operated within HEW. DED subsequently

tation designed to resolve confusion concerning Title IX compliance. After considering public comments, it published the final policy Interpretation in the Federal Register. 44 Fed. Reg. 71,413 (1979). The Policy Interpretation:

> clarifies the obligations which recipients of Federal aid have under Title IX to provide equal opportunities in athletic programs. In particular, this Policy Interpretation provides a means to assess an institution's compliance with the equal opportunity requirements of the regulation which are set forth at [34 C.F.R. §§ 106.37(c) and 106.41(c)].

44 Fed. Reg. at 71,415. The Policy Interpretation is divided into three categories: "Athletic Financial Assistance (Scholarships)," 44 Fed. Reg. at 71,415; "Equivalence in Other Athletic Benefits and Opportunities," 44 Fed. Reg. at 71,415; and "Effective Accommodation of Student Interests and Abilities." 44 Fed. Reg. at 71,417. Litigation focused on the "Effective Accommodation" section.

The "Effective Accommodation" section of the Policy Interpretation interprets the first of the ten factors found in the regulations at 34 C.F.R. § 106.41(c)(1) (stating that the Director should consider "[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes"). The Policy Interpretation measures compliance in the area of effective accommodation first by applying a three prong test and second by applying a two part test. The three prong test assesses compliance by determining:

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inherited the final Policy Interpretation. When DED re-promulgated the exact same regulations which the Policy Interpretation was issued to interpret, *see supra* note 23, DED sent "an unmistakably clear signal of the agency's satisfaction with the Policy Interpretation." *Cohen*, 991 F.2d at 896 n.10.

(1) Whether intercollegiate level participation opportunities for male and female students are provided in number substantially proportionate to their respective enrollments; or

(2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or

(3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

44 Fed. Reg. at 71,418. The two part test [20] assesses compliance by examining:

(1) Whether the competitive schedules for men's and women's teams, on a program-wide basis, afford proportionally similar numbers of male and female athletes equivalently advanced competitive opportunities; or

(2) Whether the institution can demonstrate a history and continuing practice of upgrading the com-

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[20] The two part test is not at issue in this case and is listed solely for the purpose of providing a more complete context for the provisions that are central to this case. At the preliminary injunction stage I found, tentatively, that "the competitive schedules at Brown provide men and women with 'equivalently advanced competitive opportunities.'" *Cohen*, 809 F.Supp. at 994. Nothing introduced at the trial on the merits alters my opinion that the competitive schedules offered to men and women at the university-funded varsity level are equivalent to each other and that the competitive schedules offered to men and women at the donor-funded varsity level are equivalent to each other.

> petitive opportunities available to the historically disadvantaged sex as warranted by developing abilities among the athletes of that sex.

44 Fed. Reg. at 71,418.

The "Effective Accommodation" section of the Policy Interpretation, which includes both the three prong test and the two part test, also provides that a school need not establish an intercollegiate team where there is no reasonable expectation of competition in that sport within the institution's normal geographic area of competition. 44 Fed. Reg. at 71,418.

Finally, the Policy Interpretation's "Effective Accommodation" section provides that the following factors should be considered in an overall determination of compliance pursuant to 34 C.F.R. § 106.41(c):

> (a) Whether the policies of an institution are discriminatory in language or effect; or
>
> (b) Whether disparities of a substantial and unjustified nature in the benefits, treatment, services, or opportunities afforded male and female athletes exist in the institution's program as a whole; or
>
> (c) Whether disparities in individual segments of the program with respect to benefits, treatment, services, or opportunities are substantial enough in and of themselves to deny equality of athletic opportunity.

44 Fed. Reg. 71,418.

D. Title IX Athletics Investigator's Manual

The 1990 Title IX Athletics Investigator's Manual, published by OCR, was designed to assist OCR investigators in determining whether an institution is in compliance with Title IX. The Manual serves as a practical guide in the agency's enforcement of the Policy Interpretation. Valerie M. Bonnette & Lamar Daniel, Department

of Education, Title IX Athletics Investigator's Manual (1990).

V. DEFERENCE TO AGENCY REGULATIONS AND INTERPRETATION OF TITLE IX

In *Cohen*, the First Circuit held that the regulations promulgated pursuant to Title IX deserve controlling weight. 991 F.2d at 895. This degree of deference is appropriate because Congress "explicitly delegated to the agency the task of prescribing standards for athletic programs under Title IX." *Cohen*, 991 F.2d at 895 (citations omitted). *See* Javits Amendment, Pub. L. No. 93-380, § 844, 88 Stat. 612 (1974). The appellate court also concluded that the Policy Interpretation, because it is a "considered interpretation" of the aegncy's own regulation, warrants "substantial deference." *Cohen*, 991 F.2d at 896-7.

As I have discussed above, *supra* part III.B, this Court is bound by the law of the circuit. As a result, this Opinion and Order must accord controlling weight to the regulations and substantial deference to the Policy Interpretation. However, I revisit the issue of deference in order to address defendants' position that the First Circuit did not have the benefit of newly developed arguments and information or that "no court has carefully examined the issue of the degree of deference, if any, to which the OCR's Policy Interpretation and Investigator's Manual are entitled." Defs.' Post-Trial Mem. at 25.[27]

It is well-settled that where Congress has expressly authorized an agency to issue regulations, those agency regulations are binding on the courts "unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron, U.S.A. v. Natural Resources Defense*

[27] Because I do not rely on the Investigator's Manual, except to refute an incorrect reliance upon it, *see infra* note 51, I decline to address specifically the degree of deference to which this document is entitled.

Council, 467 U.S. 837, 844 (1984). *See also National Latino Media Coalition v. F.C.C.*, 816 F.2d 785, 788 (D.C. Cir. 1987) (stating that "[w]hen Congress delegates rulemaking authority to an agency, and the agency adopts legislative rules, the agency stands in the place of Congress and makes law").

Here, Congress explicitly delegated rulemaking authority to DED, *see supra* note 23, stating:

> The Secretary shall prepare and publish, not later than 30 days after the date of enactment of this Act, proposed regulations implementing the provisions of Title IX of the Education Amendments of 1972 relating to the prohibition of sex discrimination in federally assisted education programs which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports.

Javits Amendment, Pub. L. No. 93-380, § 844, 88 Stat. 612 (1974). This delegation of authority specifically directed DED to include within its intercollegiate athletic regulations "reasonable provisions considering the nature of particular sports." Thus, Congress included within its conferral of rulemaking authority a specific directive with respect to the intercollegiate athletic regulations; this directive mandates the inclusion of one particular subject but does not otherwise limit the broad scope of authority delegated to the agency.

The agency's regulations were duly approved by President Ford in 1975. This approval was required by Title IX itself, which provides that no "rule, regulation, or order" an agency is empowered to enact pursuant to Title IX shall become effective unless and until approved by the President. 20 U.S.C. § 1682. The regulations, which were designed to address extensive evidence of sex discrimination in intercollegiate athletics, clearly meet the *Chevron* standard; they are not arbitrary, capricious or manifestly contrary to Title IX. *Kelley*, 35 F.3d at 270.

An agency's interpretation of its own regulations, while not given the force of law, is entitled to substantial deference. *Lyng v. Payne*, 476 U.S. 926, 939 (1986) (citations omitted). *See also Udall v. Tallman*, 380 U.S. 1, 16 (1965) (noting that "[w]hen the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order"). The Supreme Court explained its reasoning for this conclusion in *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 151 (1991) (citing *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 556, 558 (1980)):

> Because applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, we presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers.

Thus, for all practical purposes, an agency's interpretation of its own regulations is accorded the force of law unless such interpretation is clearly erroneous or inconsistent with the regulation. *United States v. Larionoff*, 431 U.S. 864, 872 (1977) (quoting *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 414 (1945)). *See also McCuin v. Secretary of Health and Human Servs.*, 817 F.2d 161, 168 (1st Cir. 1987) (the interpretation "must be reasonable in view of the language of the regulations and the policies they were meant to implement").

As the First Circuit has held, the Policy Interpretation should be given substantial weight. *Cohen*, 991 F.2d at 896-97. The Policy Interpretation is a "considered" document: the original draft of the Policy Interpretation was published for public comment, the agency received over 700 comments, and agency staff visited eight universities to evaluate how the Policy Interpretation and other alternatives would be applied in practice. 44 Fed. Reg. at 71,413. *Cf. Udall*, 380 U.S. at 17 (noting with approval that the agency's interpretation had been a matter of

public record and discussion). In addition, since publication of the Policy Interpretation, Congress has had the opportunity to disapprove of the Policy Interpretation, *see* Civil Rights Restoration Act of 1987, 20 U.S.C. § 1687 (1988); however, Congress instead chose to reaffirm its intent that Title IX's prohibition against discrimination be broadly construed. *See Cohen*, 991 F.2d at 894 (recognizing that record of the floor debate on Restoration Act "leaves little doubt that the enactment was aimed, in part, at creating a more level playing field for female athletes") (citations omitted). *Cf. North Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 535 (1982) (where "an agency's statutory construction has been 'fully brought to the attention of the public and the Congress,' and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned") (citations omitted).

Defendants dispute the First Circuit and this Court's determination of the degree of judicial deference appropriately accorded to the agency's regulations and interpretations. They argue that the agency exceeded its delegated rulemaking authority, and that the documents are therefore "interpretive" rather than "legislative." Defendants argue that the rulemaking authority Congress delegated to the agency was limited by the Javits Amendment to provisions concerning the nature of particular sports. Thus, defendants conclude that to the extent the regulations went beyond that specific directive they are "interpretive" rather than "legislative" and are thus entitled to the less deferential standard of review articulated in the germinal cases *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) and *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). Defendants' reliance on *Skidmore* and *Gilbert* is misplaced because these cases concern agency guidelines issued in the *absence* of an explicit Congressional delegation of authority. Here, however, Congress did authorize the agency to promulgate regulations imple-

menting Title IX. This Court is persuaded that "the directive that those regulations 'include reasonable provisions considering the nature of particular sports' does not limit the scope of the delegation; it merely compels the agency to include such provisions in its broader regulatory framework." Proposed Findings of Fact and Conclusions of Law of Pls. at 28. As I noted above, these regulations must therefore be given controlling weight. Similarly, the Policy Interpretation was issued as a result of the duly delegated rulemaking authority entrusted to the agency, and is therefore entitled to substantial deference. *Cf. Martin*, 499 U.S. at 151 (where the Court acknowledged that an agency's power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers).

Defendants further contend that the Policy Interpretation, because it was never approved by the President, does not have the binding effect of "rules, regulations, or orders" authorized by 20 U.S.C. § 1682. The Policy Interpretation, however, is not a rule, regulation, or order, but is a guideline designed to interpret a rule, regulation, or order, namely, the agency's own regulations published at 34 C.F.R. § 106. The Policy Interpretation therefore need not be approved by the President in order to become effective.

In sum, this Court must abide by the Policy Interpretation unless it is clearly erroneous or inconsistent with the regulations. *See Larionoff*, 431 U.S. at 872. Defendants protest that the Policy Interpretation contravenes the intent of Title IX in at least two respects. First, they claim that the Policy Interpretation, as interpreted by this Court, renders Title IX an affirmative action statute, in derogation of Title IX, which specifically provides that it shall not be interpreted to require preferential or disparate treatment to members of one sex. 20 U.S.C. § 1681(b). This claim, however, is premised on a misunderstanding of the Policy Interpretation. The Policy Interpretation's three prong test does not *mandate* statistical balancing.

In fact, the test is designed to avoid an absolute requirement of numerical equality. Where substantial proportionality has not been achieved (prong one), an institution must be found in compliance if it demonstrates that it has a continuing practice of expanding the athletic opportunities of the underrepresented sex (prong two) or if its existing program fully and effectively accommodates the interests and abilities of the underrepresented sex (prong three). *Kelley*, 35 F.3d at 271. Thus, the test encourages equality but recognizes that some institutions may be unable to attain this goal through no fault of their own; in these cases, the test provides alternatives to statistical parity.

Second, defendants claim that OCR ignored the Javits Amendment's instruction to consider the nature of particular sports in drafting reasonable provisions with respect to intercollegiate athletics. "[D]ue to the nature of particular sports, there are upwards [of] 150 to 175 . . . participation opportunities for men (on football, wrestling, lacrosse and the like) that cannot be available to women." Defs.' Post-Trial Mem. at 27. On the contrary, the Policy Interpretation does consider the nature of particular sports. For example, it permits the operation of separate teams for members of each sex and does not require a school to sponsor a women's team for every men's team offered and vice versa. In addition, it recognizes that different expenditures on men's and women's sports may be permissible if based on factors inherent to the operation of specific sports. The fact that the Policy Interpretation does not consider and accommodate the nature of different sports in the precise manner advocated by defendants does not render it unreasonable. *See Cohen*, 991 F.2d at 899.

VI. LEGAL ANALYSIS

A. The Three Prong Test

The plaintiffs contend that the Brown athletic program is in violation of the "Equal Opportunity" provision of the Title IX athletics regulations. Therefore, I focus my analysis on the Policy Interpretation to "clarif[y] the obligations which [Brown has] to provide equal opportunities in [its] athletic programs." 44 Fed. Reg. at 71,415. I must assess compliance by looking to the regulations applicable in this case. These regulations, as noted above, are: 34 C.F.R. § 106.37(c) (distribution of athletic scholarships—not applicable to this case), 34 C.F.R. § 106.41(a) and (b) (general non-discrimination pronouncement but allowing for separate teams—not at issue in this case), and 34 C.F.R. § 106.41(c) (requiring institutions to provide equal opportunity to both sexes in athletics programs offered, and listing ten factors for consideration in assessing compliance). The subject of this lawsuit is whether or not Brown complies with the "Equal Opportunity" provision found at 34 C.F.R. § 106.41(c). Litigation has primarily focused on the first of the ten "equal opportunity" factors which asks "whether the selection of sports and levels of competition effectively accommodate the interest and abilities of members of both sexes." 34 C.F.R. § 106.41(c)(1). Determining compliance with this factor requires application of the Policy Interpretation's three prong test, recited *supra* part IV.C, which delineates the standards for enforcement of 34 C.F.R. § 106.41(c)(1). Because the proper interpretation of the three prong test is the most hotly contested legal issue in this case, I will extensively analyze and address the relevant arguments presented by the parties.

1. *Prong One*

An institution complies with the three prong test if it meets prong one of the analysis and no other. Plaintiffs

bear the burden of proving that the institution does not satisfy prong one. Prong one asks:

> Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments . . .

44 Fed. Reg. at 71,418. I conclude that an institution satisfies prong one provided that the gender balance of its intercollegiate athletic program substantially mirrors the gender balance of its student enrollment. "Thus, a university which does not wish to engage in extensive compliance analysis may stay on the sunny side of Title IX simply by maintaining gender parity between its student body and its athletic lineup." *Cohen*, 991 F.2d at 897-98. I now discuss the meaning of three contested elements of prong one.

a. Intercollegiate Level Athletics

The Policy Interpretation expressly states that it is intended to apply to intercollegiate athletics.[28] It explains, however, that because the regulations distinguish between club sports and intercollegiate sports, "under this Policy Interpretation, club teams will not be considered to be intercollegiate teams except in those instances where they regularly participate in varsity competition." 44 Fed. Reg. at 71,413 n.1. It was not seriously contended until the eleventh hour, nor did the evidence show, that any of Brown's club teams should be considered to be presently operating as intercollegiate teams under this definition.[29] Therefore, I do not treat any of Brown's club

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[28] However, "its general principles will often apply to club, intramural, and interscholastic athletic programs, which are also covered by regulation." 44 Fed. Reg. at 71,413. Here, plaintiffs have not challenged Brown's non-varsity programs.

[29] For the majority of the trial, defense counsel represented that intercollegiate athletic participation opportunities at Brown relate

programs as intercollegiate teams under prong one. On the other hand, Brown's donor-funded varsity teams resemble university-funded varsity teams in some aspects and club teams in others. *See supra* notes 6-13 and accompanying text. Thus, the question arises whether donor-funded teams may be considered to be "intercollegiate" teams for the purposes of prong one.

It is evident that Brown's donor-funded teams operate at a disadvantage in comparison to its university-funded varsity teams.[30] The issue with regard to funding sources

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only to university-funded and donor-funded varsity teams. Trial Tr. 11/1/94 at 89.

The testimony later offered in support of the position that some of the club teams engage in "intercollegiate competition" was given by Brown's Assistant Athletic Director, Jeffrey Ward. Conceding his uncertainty, he testified that he believed that the following club teams might engage in substantial competition with varsity teams at other colleges: women's water polo, women's soccer, women's skiing, women's and coed sailing, and men's skiing. Trial Tr. 12/8/94 at 139-40. However, in addition to being unable to ascertain from the record which of the clubs' competitors were varsity teams, this Court has no way of determining the number of participants (with the exception of women's water polo) on each of these club teams. As Brown acknowledged in its answer to plaintiffs' interrogatories, club team rosters are not maintained by either the athletic department or the student activities office. Pls.' Ex. 1 at 6-7.

[30] While both men's and women's teams at the donor-funded level may operate at a disadvantage compared to university-funded teams, the burden of this status falls more heavily on women's teams. There was ample testimony that women's teams are less able than men's teams to raise necessary funds from private donations. Although defendants attributed this fund raising disparity to lack of effort on the part of women's coaches and teams, I find Coach Robert Rothenberg's explanation more persuasive. As head coach of both the men's and women's track team, he testified that he and his staff worked equally hard to raise money for both teams but were never able to raise as much money on behalf of the women's team as they were able to raise for the men's team. He

is not *where* the funding comes from but the extent to which funding comes at all to donor-funded teams. Donor-funded teams generally have much less money, have no commitment from the university that the team will be supported in a year when fund raising efforts are less successful, and must expend gift funds for privileges that Brown provides to university-funded teams at no cost to those teams. As a result of their unfunded status, most of the donor-funded teams are prevented from reaching their full athletic potential.[31] However, the evidence presented at trial suggests that, on the whole, Brown's donor-funded teams do engage in "varsity level" competition.

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attributed this disparity to the financial bases available and to traditional patterns of giving, stating:

> [The] women's track and field program at Brown started about 1978, the men's started about a hundred years before. When you look at the giving, you are not going to get major contributions [from] men or women that are in their twenties or thirties. Your biggest contributions will come from people that have raised their children, that are out, that have accumulated some money and are looking for [a] way to [give] back to the university in the sport that he or she participated in. I think traditionally men have probably controlled more of that money available in families. But for whatever the reason, there's a tremendous difference in the ability to fund raise for men and for women and I've been doing [it] for 13 years.

Trial Tr. 12/1/94 at 188-89.

[31] Kim Havell, the 1994-95 women's ski team captain illustrated this point:

> Q: Have you enjoyed all of the aspects of competing to become a top-flight women's ski program at Brown?
>
> A: I would say no to that in the sense that it's been a lot of—it's hard to get everything together. Every year the captains have to put in a lot of work to make sure everyone knows when the races are, when we have to meet. All the details we have to worry about too, the team members have to consider. And it's not just set up, you go, you do the best you can. Your mind is on the duties you have to the team, not just on competing and doing the best that you can.

Trial Tr. 9/29/94 at 75.

Thus, I treat both donor-funded and university-funded varsity teams as intercollegiate teams but as positioned at distinct levels within the athletic hierarchy.[32]

b. Substantially Proportionate

The phrase "substantially proportionate" is necessarily an elusive concept. Consequently, I turn toward other factors to inform my interpretation of this term. Because a positive showing on prong one terminates the inquiry, providing a "safe harbor" for the institution, *Cohen*, 991 F.2d at 897, logic suggests that "substantially proportionate" must be a standard stringent enough to effectuate the purposes of the statute. At the same time, "substantially proportionate" accounts for the possibility of minor fluctuations in the undergraduate population and in the athletic program from one year to the next. Thus, substantial proportionality is properly found only where the institution's intercollegiate athletic program mirrors the student enrollment as closely as possible. This defini-

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[32] The Policy Interpretation applies separately to each level of athletic program within an institution. The Policy Interpretation states that it "is designed specifically for intercollegiate athletics, however its general principles will often apply to club, intramural, and interscholastic athletic programs . . . ." *See* 44 Fed. Reg. at 71,413. Brown's unusual two-tiered treatment of its varsity program defies easy categorization. Because Brown has created another layer of athletic offerings, it is arguable that this Court should assess compliance by independently applying the Policy Interpretation to each tier of its intercollegiate varsity program. This method would give effect to the "Overall Determination of Compliance" element of the Policy Interpretation's "Effective Accommodation" provision. *See* 44 Fed. Reg. at 71,418 (asking "[w]hether disparities in individual segments of the program with respect to benefits, treatment, services, or opportunities are substantial enough in and of themselves to deny equality of athletic opportunity"). *See supra* part IV.C.

I have chosen not to adopt this method; however, I note that the factual record could only support a finding of noncompliance pursuant to this alternative application.

tion takes into account any small variations that are beyond the institution's ability to control or predict.

Defendants argue that "substantially proportionate" must be interpreted very liberally, in favor of the institution, lest a sudden surge in numbers on one team propel a complying institution into violation.[33] Defendants emphasize that the gender composition of the athletic program is both unpredictable and out of Brown's control, asserting that "Brown is stuck with whomever shows up on campus." Trial Tr. 12/16/94 at 61. This position ignores several significant facts. First, prong one compliance is assessed by comparing the gender ratio of the student enrollment with the gender ratio of the *entire* intercollegiate athletic program. It is unlikely that numerical fluctuations on an individual team will significantly alter the gender ratio of any sizable athletic program. In fact, testimony in the trial revealed that the fluctuations, from year to year, of the gender balance in the athletic program at Brown were minimal. Second, this position fails to acknowledge that when significant numerical changes did occur in the intercollegiate athletic program as a whole, these changes were within the control of the University. Plaintiff's expert, Dr. Christine Grant, Athletic Director for the women's program at the University of Iowa and a former official of a number of collegiate athletic associations, testified persuasively that a university "predetermines" the approximate number of athletic participants and the male to female ratio. I conclude that Brown does predetermine the gender balance of its athletic program through the selection of sports it offers (some sports, by their nature, require more players), the size of the teams it maintains (as dictated by each coach's preference), the quality and number of coaches

[33] "[T]hink of the university that in one year has 54 men track participants and in year two has 70 men's track participants. Does that mean that [the athletic director] has to wave a magic wand over the athletic department and create a new team of 16 women?" Trial Tr. 12/16/94 at 52.

it hires, and the recruiting and admissions practices it implements. *Cf.* Prelim. Inj. Hr'g Tr. 10/26/92 at 20. For example, coaches at Brown acknowledged the prominent role recruiting plays in sustaining Brown's varsity athletic program. Most coaches testified that they determine an ideal team size and then recruit the requisite number of athletes to reach that goal. Because recruits constitute the great majority of athletes on nearly all of Brown's university-funded varsity teams, the University should not have been surprised by the gender mix of interested athletes on campus.[34]

c. Participation Opportunities

The First Circuit, in sustaining the preliminary injunction, did not define the term "participation opportunities" as set forth in prong one of the Policy Interpretation. It now rests upon me to formulate a definition. For the purposes of the three prong test, I hold that the "participation opportunities" offered by an institution are measured by counting the *actual participants* on intercollegiate teams. The number of participants in Brown's varsity athletic program accurately reflects the number of participation opportunities Brown offers because the University, through its practices "predetermines" the number of athletic positions available to each gender.[35]

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[34] At the preliminary injunction hearing, John Parry, Brown's Athletic Director from January 1979 to January 1990, was asked, "When you were at Brown, was it true, in your view, that Brown's activities effectively did predetermine the percentage of—the percentage of men and women participating in intercollegiate athletics?" He responded, "Yes." Prelim. Inj. Hr'g Tr. 10/27/92 at 130.

[35] Brown argues that under this "predetermination" analysis it is inconsistent to find that there are club team members who are interested and able to compete at the varsity level. If only recruited athletes have the ability to compete at the Division I varsity level for the purposes of prong one, defendants argue, plaintiffs cannot at the same time maintain that non-recruited club

In addition, as noted below, any other measure of participation opportunities is infeasible. While the First Circuit did not explicitly define "participation opportunities" as participation rates, it implicitly adopted and applied this definition in its prong one analysis.

Defendants contend, however, that the concept "participation opportunity" carries a very different practical meaning from the simpler concept of "participation." They argue that the intercollegiate athletic participation opportunities offered at Brown should be measured by counting each team's filled *and unfilled* athletic slots.[36] The defendants offer several methods of determining the exact number of slots that they contend are available but unfilled.

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team athletes have the ability to compete at the varsity level for the purposes of prong three. Defs.' Reply Br. at 4.

Defendants err in conflating the analyses of prong one and prong three. Under prong one, the ability of recruited athletes is relevant only because Brown effectively limits participation on its varsity teams to recruited athletes, which in turn logically requires this Court to equate "participation opportunities" with actual participation rates, for the purposes of prong one. It is not the position of this Court that only recruited athletes *could* compete on Brown's varsity teams, rather the evidence has demonstrated that it is in fact the practice at Brown to rely almost exclusively on recruited athletes to field varsity teams. Under prong three, the ability of club athletes is a factor of the test itself, but the standard of prong three is generous: the underrepresented sex need only demonstrate the interest and ability to compete in an "intercollegiate schedule" as defined in the Policy Interpretation. *See* 44 Fed. Reg. at 71,413 n.1. A club team can demonstrate the interest and ability to compete in an "intercollegiate schedule" without presently operating at the same level of competitiveness maintained by longstanding university-funded Division I varsity teams.

[36] I have found that Brown "predetermines" the approximate number of varsity positions available to men and women; the concept of any measure of unfilled but available athletic slots does not comport with reality.

First, Brown proposes that participation opportunities should include those additional athletic slots that women's team coaches testified they were able to support, given current resources. This method is flawed because many coaches, while technically able to support more team members, restrict their team size according to their personal coaching philosophies. Thus, these theoretical opportunities are not actually available to athletic hopefuls.[37] I also note that even if I were to accept this definition of participation opportunities, or any other measure of "unfilled but available" positions, I would be compelled to compare the women's *and* the men's theoretically available additional spots.

Second, Brown asserts that each team is necessarily capable of carrying, at a minimum, the number of athletic positions it has supported in recent history. They contend that each team therefore affords at least that number of opportunities to participate, even during years in which the actual participation rates fall short of their historical high. I must reject the assertion that peak numbers achieved during some year in the past are the most accurate measure of participation opportunities *presently* offered by an institution.[38] Numbers from the *cur-*

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[37] Under the same rationale, it is incorrect to equate participation opportunities with the number of athletes permitted to travel with the team to "away" games, as determined by the NCAA, because Brown does not require coaches to maintain their teams at travel squad size. Thus, I reject Brown's proposal to measure participation opportunities by NCAA team travel squad sizes.

[38] A number of factors support this conclusion. First, Brown conceded that each coach employs his or her own philosophy in limiting team size. Because a current coach may make adjustments in his or her coaching practices over the years, and because a newly hired coach may implement different governing policies from that of a predecessor, only the current team size accurately reflects the number of participation opportunities actually offered to students. For instance, although previous swimming coaches had maintained a team with as many as 36 members, the new

rent or most recent, complete competitive season provide the most representative quantification of participation opportunities *presently* offered.

Third, in the alternative, Brown contends that each women's team for which there is an "equivalent" men's team is by definition able to carry at least the number of athletic positions carried by its counterpart in the men's program. Brown maintains that each women's team, therefore, affords at least as many participation opportunities as its "matching" men's team. I decline to adopt this methodology. It is not immediately apparent why the size of men's teams should set the standard for women's team sizes. Nor does the evidence presented at trial justify this approach. Men's and women's teams of the same name are sufficiently distinct from one another to invalidate any approach that rests upon an assumption of similarity.[39] I conclude that intercollegiate

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head coach of men's swimming testified that he did not plan to coach such a large team. Trial Tr. 12/8/94 at 114.

Second, the coaches' testimony demonstrated that the number of positions open to newcomers in any given year depended upon the number of members expected to graduate, the strength of the existing team, and the abilities of the prospective athletes. Because these latter variables may change team size slightly, team numbers from past years may not be a reliable indication of current participation opportunities.

[39] Although many men's and women's teams share the same name, they may not require the same number of team members in order to compete effectively. Different rules of play, including but not limited to, rules of substitution, amount of contact permitted, size of field, and number of specialized positions involved determine appropriate team size. For example, Dr. Donna Lopiano, Executive Director of the Women's Sports Foundation, and an accomplished four sport athlete honored in the softball hall of fame, discussed some of the differences between baseball and softball:

> I think softball and baseball are two completely different sports, that baseball will have a larger team size than softball will primarily because of the [effect of] pitching. It is typical on a baseball team to carry anywhere from six to ten pitchers

" '[a]thletic opportunities' means real opportunities, not illusory ones," *Horner*, 43 F.3d at 274 (quoting *Williams v. School Dist. of Bethlehem*, 998 F.2d 168, 175 (3d Cir. 1993)), and therefore should be measured by counting *actual participants*.

Finally, defendants offer an independent interpretation of the meaning of "participation opportunities" in the context of prong one. They define a participation opportunity as a *chance* for an *interested* person to participate. Defendants contend that where the student body is comprised of equal numbers of men and women, equality means "offering" the chance to participate in athletics to an equal number of men and women.[40] They postulate

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> because of the stress that is involved in throwing a baseball. . . . [I]n the sport of softball a single pitcher can pitch 44 consecutive innings, and I have done so on a number of occasions, without any stress on the shoulder joint because your arm is closer to your body and in a much more well supported position when you're throwing the ball. Where a baseball pitcher typically cannot throw more than 11 or 12 innings at a time and needs two or three days rest to recover. So just that factor alone will result in participation differences of 10 to 20 percent on the size of a baseball to the size of a softball team.

Trial Tr. 12/2/94 at 14-15. *See also* Trial Tr. 9/27/94 at 39 (men's and women's fencing coach testifying that women fence in only one weapon [and now in two] whereas men fence in three, thus resulting in many more positions available for men on a fencing team).

[40] Defendants explain their theory with a hypothetical. In this hypothetical, there are 1000 men and 1000 women in the student body at a university that has 150 gender-neutral athletic slots available. 500 men and 250 women in the student body (50% of men enrolled and 25% of women enrolled) are interested in filling these spots, and a random lottery is conducted in which students are offered a guaranteed position on the team. Where equal numbers of randomly selected men and women are offered such an opportunity, 50% of the men and 25% of the women will accept. Thus, although equal numbers of men and women are offered a position, 100 men and 50 women, due to the relative interest of

that if students were offered a hypothetical opportunity to participate, the students would actually participate in varsity athletics in accordance with the relative interest of their respective genders. Thus, where the gender ratio of a university's interested student population is substantially proportionate to the gender ratio of its athletic program, it may be assumed that men and women in the student body were "offered" an equal "opportunity" to participate. Therefore, defendants claim, Brown provides equal "participation opportunities" if the ratio of men to women among varsity athletes is substantially proportionate to the ratio of men to women among students interested in participating in varsity athletics. Defendants conclude that, in order to succeed on prong one, plaintiffs bear the burden of proving that the percentage of women among varsity athletes is not substantially proportionate to the percentage of women among *students interested in participating in varsity athletics.*[41]

Defendants, through their expert Dr. Finis Welch, a prominent labor economist, borrow from Title VII employment discrimination jurisprudence. There, the relevant comparison is between the qualified applicant pool and the work place demographics, rather than between the population of the United States and the work place demographics. This analogy is the basis for defendants' argument that the relevant comparison in Title IX cases is between the *interested* potential varsity athlete pool, however defined, and the make up of Brown's athletic

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their gender, will fill the 150 slots. *See* testimony of Dr. Finis Welch, Trial Tr. 11/22/94 at 13-15 and 19-24.

[41] At the preliminary injunction stage, defendants similarly sought to make the relative interests of men and women the relevant inquiry. However, at that time, defendants propounded this theory under the authority of prong three. *See infra* part VI.A.3.a. The First Circuit squarely rejected this analysis with respect to prong three, *Cohen*, 991 F.2d at 899-900, and I now decline to adopt it with regard to prong one.

program, rather than between the student enrollment and the athletic program. Comparison to Title VII is inapposite, however.[42] Title VII seeks to determine whether gender-neutral job openings have been filled without regard to gender. Title IX, on the other hand, was designed to address the reality that sports teams, unlike the vast majority of jobs, *do* have official gender requirements, and this statute accordingly approaches the concept of discrimination differently from Title VII. *Cf. Kelley*, 35 F.3d at 270 (stating that "Congress itself recognized that addressing discrimination in athletics presented a unique set of problems not raised in areas such as employment and academics") (citations omitted). Title IX establishes a legal presumption that discrimination exists if the university does not provide participation opportunities to men and women in substantial proportionality to their respective student enrollments, unless the university meets one of the two exonerating situations set forth in prongs two and three. *See Kelley*, 35 F.3d at 271.

Entirely apart from the flaws in the Title VII-Title IX analogy, there are a number of other problems with interpreting prong one to require that a university afford athletic opportunities to men and women in proportion to their relative interests in athletics. Under this Court's interpretation of prong one, concerned parties can assess an institution's compliance simply by comparing the gender ratio of participating athletes with the gender ratio of the student body, both of which are easily ascer-

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[42] *Cf. Cohen*, 991 F.2d at 902 (rejecting analogy to Title VII with respect to allocation of burden of proof on elements of three prong test and noting the substantial differences between Title IX and Title VII statutory purposes and between the education and employment contexts). The factors articulated by the First Circuit in declining to import Title VII burdens of proof also support my rejection of defendants' attempt to superimpose the meaning of discrimination in Title VII upon the plain language of Title IX.

tained. Under the defendants' theory, a concerned party must undertake a complicated assessment of "interested" students before making any comparisons. Any such assessment will be meaningless since it is an impossible task to quantify latent and changing interests.[43] Thus, in addition to contravening the plain language of prong one, defendants' interpretation imposes a heavy burden on student-plaintiffs, the courts, and institutions who wish to monitor their own compliance.[44] In any case, it is unclear what population should be surveyed to assess the interest of the "qualified applicant pool," even if it were possible to do so.

The possible survey populations range from matriculated students, to all actual Brown applicants, to all

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[43] Defendant's distinguished expert, Dr. Finis Welch, acknowledged that there is no single factor by which to measure that degree of athletic interest that will reliably be acted upon when the opportunity is present. "[T]he interest measures that we get vary. I mean there is an overall pattern and they fall within the pattern, but there's—there's no one place that we can go to to get a rock solid measure of interest." Trial Tr. 11/29/94 at 115.

Dr. Welch illustrated the difficulty in quantifying interest when he was asked by the Court, "[W]hat constitutes an interested man or an interested woman?" Dr. Welch responded, "That's hard. And that's what we're going to do is draw information from various sources because we don't know." Dr. Welch listed a variety of survey sources and concluded, "I would try to combine the attitudinal information, the survey kind of question with the realization, 'What do I see by way of people showing up.' " Trial Tr. 11/22/94 at 15-17.

[44] Given the difficulty of measuring the relative interests of men and women, it would be almost impossible for an institution to remain in compliance with Title IX by staying abreast of the ever-changing relative "interests" of its male and female students and adjusting its program offerings accordingly. Because defendants' interpretation would require substantial proportionality between the gender balance of its athletic program offerings and the gender balance of interested prospective student-athletes, constant rebalancing would be necessary to maintain compliance, thereby eliminating the ability of an institution to verify easily that it falls within the "safe harbor" that prong one provides.

academically able potential varsity participants. In an analogy to Title VII and the "qualified applicant pool," defendants argue that the relevant population consists only of those men and women who might be interested and able to participate in varsity athletics. Uninterested and unathletic persons are irrelevant to any assessment of the substantial proportionality between the athletic program and the student enrollment. The question, under defendants' theory, then becomes who belongs to the "qualified applicant pool" from which Brown might draw student-athletes. Each of the possible "pools" from which Brown might draw varsity athletes has inherent theoretical and practical problems as a survey population, which confirms my initial conclusion that defendants' interpretation of prong one is incorrect. I will now discuss each of the possible survey pools.

(i) Matriculated Students

Because Brown, as a Division I school, actively recruits nationwide most of the students who play on its varsity teams, the survey population of potential participants must be broader than the pool of matriculated students. What students are present on campus to participate in a survey of interests has already been predetermined through the recruiting practices of the coaches. What teams are established and can recruit or qualify for admissions preferences has already been predetermined by Brown. Thus, the interest present on campus is controlled by Brown; to then suggest that Brown must only satisfy the relative interests of students present on campus is circular.

(ii) Actual Brown Applicants

Defendants have suggested that an appropriate survey population might consist of all students who applied to Brown. They claim that several already existing questions on Brown's application would provide an easy determination of the relative interests in varsity athletics.

There are two problems with using this group of students as the determinative "pool." First, it revisits the conceptual problems inherent in attempting to measure "interest." *See supra* note 43. It cannot be true that questions on Brown's application provide a reliable measure of interest that will be acted upon given the opportunity.[45] Although many women who later committed to attend Brown expressed some type of interest in sports at the time of application, far fewer actually participate in Brown's intercollegiate athletic program.[46] Second, using the pool of actual Brown applicants fails to consider the fact that college applicants interested in a sport not offered as a varsity sport at Brown may not even apply to Brown. A survey of actual Brown applicants would thus fail to capture the interest of those student-athletes who choose not to apply due to the limits of Brown's program offerings. To suggest that Brown need only satisfy the interests of actual applicants where Brown's selection of program offerings affects who applies to the school in the first place is illogical.

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[45] Question 9 on the application form asked applicants to list activities that they might pursue at Brown. Pls.' Ex. 112. Dr. Welch acknowledged that the answers to question 9 could not be used to measure precisely those interested in participating in varsity athletics, as opposed to club, intramural, and recreational sports. Trial Tr. 11/29/94 at 114-15.

[46] As Dr. Welch noted in his report:

> The fact that only small minorities of those indicating interests actually participate in varsity sports is indicative that reported interests are not necessarily firm commitments. These numbers suggest that applicants expressing potential interests in participating should be viewed as a mixture consisting of some who are seriously committed to participating and others who are, perhaps, not as committed. The alternative treatments of these groups can result in major shifts in calculated female/male interest ratios.

Defs.' Ex. IIIII, Table 30A at 92.

(iii) Academically Able Potential Varsity Participants

If one were to accept the defendants' analogy to the "qualified applicant pool" of Title VII, the most appropriate survey population would consist of all academically able *potential* varsity participants. The "qualified applicant pool" for Brown, as a Division I institution, would consist of all prospective college applicants who might apply to or be recruited by Brown if Brown offered their preferred varsity sports. Because Brown seeks athletic recruits from across the nation, the difficulties in identifying all such persons in order to construct a representative survey population may be insurmountable.

In addition, even a successful survey of all academically able potential Brown applicants could not accurately measure interest in certain sports, crew, for example, that commonly develop only after matriculation. Nor can a survey of this population account for the extent to which opportunities drive interests. *See, e.g.*, testimony of Dr. Welch, Trial Tr. 11/29/94 at 92 (question asking, "Would you agree with the following statement? If Brown provides far more opportunities for women, then maybe the percentage of interested women will rise?" and witness replying, "Sure, I don't see anything wrong with that").

For all the foregoing reasons, I reject defendants' alternative interpretation of prong one.

Under the Policy Interpretation, an institution may fail to provide participation opportunities substantially proportionate to student enrollment but still comply with the Title IX regulatory scheme. The Policy Interpretation recognizes that a school might make every attempt to accommodate women's interests and abilities and still not achieve substantial proportionality. Therefore, an institution is permitted to maintain an athletic program that

provides substantially more opportunities to students of one gender than to the other if it comports with one of the two other prongs. In this way, the Policy Interpretation accommodates the equal opportunity mandate of Title IX without *requiring* strict quotas.

2. *Prong 2*

In the event that an institution fails prong one, it can still prevail by demonstrating compliance with prong two. Defendants bear the burden of proof on prong two, which asks:

> Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex . . .

44 Fed. Reg. at 71,418. Prong two illustrates that "Title IX does not require that the university leap to complete gender parity in a single bound." *Cohen*, 991 F.2d at 898. However, it does require an institution to demonstrate that it has continued to increase the number of athletes participating in intercollegiate athletics. An institution does not demonstrate "program *expansion*" by reducing men's teams so as to increase the relative percentage of female participation in intercollegiate athletics, although it may achieve compliance with prong one if it sufficiently reduces the program of the overrepresented gender. *See Roberts*, 998 F.2d at 830 (stating that "the ordinary meaning of the word 'expansion' may not be twisted to find compliance under [prong two] when schools have increased the relative percentages of women participating in athletics by making cuts in both men's and women's sports programs").

3. *Prong 3*

Even where plaintiffs can prove that an institution does not offer intercollegiate athletic participation opportunities to men and women in substantial proportionality to their respective enrollments (prong one), and where defendants are unable to demonstrate a history and continuing practice of program expansion (prong two), plaintiffs must *additionally* prove that an institution does not satisfy prong three. Prong three asks:

> Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

44 Fed. Reg. at 71,418. Prong three "requires a relatively simple assessment of whether there is unmet need in the underrepresented gender that rises to a level sufficint to warrant a new team or the upgrading of an existing team." *Cohen,* 991 F.2d at 900. Thus, provided that athletes of the underrepresented gender have both the ability and interest to compete at the intercollegiate level, they must be fully and effectively accommodated. Of course, institutions do retain discretion when met with requests for the creation of a new team or the upgrading of an existing team. They need not upgrade or create a team where the interest and ability of the students are not sufficiently developed to field a varsity team. Further:

> [i]nstitutions are not required to upgrade teams to intercollegiate status or otherwise develop intercollegiate sports absent a reasonable expectation that intercollegiate competition in that sport will be available within the institution's normal competitive regions.

44 Fed. Reg. at 71,418. Thus, defendants' concern that the Court's interpretation of prong three would require Brown to "accommodate each and every expressed student interest as long as there [is] any evidence of ability" is not well taken.[47] Defs.' Post-Trial Mem. at 1.

a. Full and Effective Accommodation

Defendants press their interpretation of prong three, originally presented at the preliminary injunction stage of this litigation. Their position is that "to the extent students' interests in athletics are disproportionate by gender, colleges should be allowed to meet those interests incompletely as long as the school's response is in direct proportion to the comparative levels of interest." *Cohen*, 991 F.2d at 899. In other words, Brown argues that it may accommodate less than all of the interested and able women if, on a proportionate basis, it accommodates less

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[47] Defendants colorfully illustrated this concern in their closing statement: "I can go onto any campus in this country, Your Honor, and probably find somebody interested in playing Russian roulette. That doesn't mean that that's an unmet need that ought to be raised to the dignity of an intercollegiate varsity." Trial Tr. 12/16/94 at 71. This portrayal of the practical consequences of this Court's interpretation fails to acknowledge the safeguards embodied in the Policy Interpretation as a whole. An institution is not required to create or elevate a team in the absence of the reasonable expectation of intercollegiate competition within the institution's normal competitive region. 44 Fed. Reg. at 71,418. It follows that there must be both a sufficient number of other teams competing in that region to provide intercollegiate competition and enough interested and able individuals for the institution to draw upon and build a competitive team. *But see* 44 Fed. Reg. at 71,418 (institutions may be required by Title IX regulations to "actively encourage" the development of such competition). As plaintiffs noted in their closing statement. "We represent a class. We don't represent any one individual and [we don't say] this person alone needs this opportunity. If you provide equal opportunities to the class members, to the potential athletes, we're satisfied even though one athlete here or one athlete there is disappointed." Trial Tr. 12/16/94 at 34.

than all of the interested and able men.[48] This is simply not the law. This Court and the First Circuit previously rejected defendants' interpretation of prong three for a number of reasons that still hold true today. Just as with prong one, defendants' theory is inconsistent with the law, is poor policy, and presents a logistical quagmire.

First, as the First Circuit detailed:

> We think that Brown's perception of the Title IX universe is myopic. The fact that the overrepresented gender is less than fully accommodated will not, in and of itself, excuse a shortfall in the provision of opportunities for the underrepresented gender. . . .
>
> In the final analysis, Brown's view is wrong on two scores. It is wrong as a matter of law, for DED's Policy Interpretation, which requires full accommodation of the underrepresented gender, draws its essence from the statute. Whether Brown's concept might be thought more attractive, or whether we, if writing on a pristine page, would craft the regulation in a manner different than the agency, are not very important considerations. . . .
>
> Brown's reading of Title IX is legally flawed for yet another reason. It proceeds from the premise that the agency's third benchmark countervails Title IX. But, this particular imprecation of the third benchmark overlooks the accommodation test's general purpose: to determine whether a student has been "excluded from participation in, [or] denied the benefits of" an athletic program "on the basis of sex . . ." 20 U.S.C. § 1681(a). While any single element of this tripartite test, in isolation, might not

[48] Thus, for example, under defendants' interpretation, where a school with a student enrollment of 1000 men and 1000 women has 500 interested men and 250 interested women, the school satisfies prong three if it provides 100 athletic positions for men and 50 for women. *Contra Cohen*, 991 F.2d at 899.

achieve the goal set by the statute, the test as a whole is reasonably constructed to implement the statute. . . .

As it happens, Brown's view is also poor policy, for, in the long run, a rule such as Brown advances would likely make it more difficult for colleges to ensure that they have complied with Title IX. Given that the survey of interests and abilities would begin under circumstances where men's athletic teams have a considerable head start, such a rule would almost certainly blunt the exhortation that schools should "take into account the nationally increasing levels of women's interests and abilities" and avoid "disadvantag[ing] members of an underrepresented sex . . ." 44 Fed. Reg. at 71,417.

Brown's proposal would also aggravate the quantification problems that are inevitably bound up with Title IX.[49] Student plaintiffs, who carry the burden of proof on this issue, as well as universities monitoring self-compliance, would be required to assess the level of interest in both the male and female populations and determine comparatively how completely the university was serving the interests of each sex. . . .

Furthermore, by moving away from OCR's third benchmark, which focuses on the levels of interest and ability extant in the student body, Brown's theory invites thorny questions as to the appropriate survey population, whether from the university, typical feeder schools, or the regional community.[50] In that way, Brown's proposal would do little more than overcomplicate an already complex equation.

Cohen, 991 F.2d at 899-900. Thus, as the First Circuit found, Brown's interpretation is logistically difficult to

[49] *See supra* note 44 and accompanying text.

[50] *See supra* note 43 and accompanying text.

administer and is inconsistent with the effective accommodation mandate of the Title IX implementing regulations in two respects. It both contravenes the plain meaning of prong three and ignores the Policy Interpretation's directive that an institution determine the athletic interests and abilities of students in such a way as to "take into account the nationally increasing levels of women's interests and abilities" and avoid disadvantaging members of an underrepresented sex. 44 Fed. Reg. at 71,417. Brown's interpretation disadvantages women and undermines the remedial purposes of Title IX by limiting required program expansion for the underrepresented sex to the status quo level of relative interests.

Additionally, the trial on the merits illustrated some of the practical and conceptual difficulties identified above by the First Circuit. Although the plaintiffs bear the burden of proof on prong three, the defendants introduced a great deal of evidence in support of their position that Brown satisfies prong three, as they interpret it. Brown conducted a survey on campus, analyzed students' college applications, and assembled a variety of national studies in an attempt to quantify the relative interest of men and women in athletics. Defendants drew from a variety of populations and survey questions, generating scores of measures of what constitutes "interest." Because no one measure and no identifiable population adequately establish relative interest, *see supra* notes 43-44 and accompanying text, defendants effectively demonstrated how their interpretation of prong three would impose an insurmountable task of Title IX plaintiffs.[51]

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[51] Contrary to this Court's view of the inherent difficulties with requiring a determination of relative interests, defendants argue that OCR plainly advocates the use of surveys as a simple measure of the relative accommodation of interest and abilities:

> [w]e have looked at what the Office of Civil Rights has instructed us to look at in terms of determining interests and abilities as they change in a university context over time. . . . [I]f any court seeks to give deference to the Office of Civil

Finally, contrary to defendants' arguments, this Court's interpretation of the three prong test does give independent meaning to each component of the test. Defendants posit:

> [T]o suggest that prong one and prong three are the same, that they both require student body ratios is to read prong three out of existence. It becomes redundant. And as the U.S. Supreme Court said in *Nordic Village* a statute must, if possible, be construed in such a fashion that every word has some operative meaning. For a court to say I have to be at student body ratios in prong one, and for a court to say I also have to be at student body ratios in prong three if I have anybody that's interested on campus, has basically thrown out the raison d'etre for prong three and said we might as well only have a one prong test.

Rights, it must give deference to how they tell us to determine interest and abilities. . . . And I quote [page 27 of the 1990 Investigator's Manual, which], points out [that] to determine interest and abilities [an institution should look to], quote, "involved club, intramural, feeder school, community, regional, physical education, and other programs." And most importantly, your Honor, they say on page [27], quote, "a survey is mentioned most often since it is usually the simplest method for the institution and O.C.R. to determine interest and abilities."

Trial Tr. 12/16/94 at 85-87. In fact, however, a closer reading of the Athletics Investigator's Manual reveals that OCR identifies surveys as a simple way to identify which additional sports might appropriately be created to achieve compliance. The Manual states on page 27 "[a] survey or assessment may be required as a part of a remedy when OCR has concluded that an institution's current program does not equally effectively accommodate the interests and abilities of students." Valerie M. Bonnette & Lamar Daniel, Department of Education, Title IX Athletics Investigator's Manual 27 (1990). Thus, a survey of interests would *follow* a determination that an institution does not satisfy prong three; it would not be utilized to make that determination in the first instance.

Trial Tr. 12/16/94 at 74-75. This Court's interpretation of prong three does require that the unmet interests and abilities of the underrepresented sex be accommodated to the fullest extent until the substantial proportionality of prong one is achieved. This requirement does not, however, render prong three meaningless. At Brown University the number of interested and able women may match or exceed the number of men participating in the intercollegiate athletic program, thus requiring Brown to achieve substantial proportionality.[62] This depth of athletic talent among the underrepresented sex may not exist to the same extent at other universities. Thus, while Brown may be unable to justify its program under prong three, because of its wealth of unaccommodated female athletes, other universities may point to the absence of such athletes to justify an athletic program that does not offer substantial proportionality. In this way, the Policy Interpretation gives effect to 20 U.S.C. § 1681(b), *see supra* part IV.A, and does not, as defendants' argue, impose an affirmative action/quota scheme on institutions receiving federal funds.

VII. APPLICATION

I now turn to the application of the Policy Interpretation to Brown University's athletic program. I will first apply the three prong test to Brown's intercollegiate athletic program pursuant to 34 C.F.R. 106.41(c)(1)

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[62] In fact, however, plaintiffs did not prove that there are women in addition to those participants in gymnastics, skiing, fencing and water polo who have the interest and ability to compete at the intercollegiate level in a sport for which there is a reasonable expectation of competition in Brown's normal competitive region. Even if Brown were to upgrade each of these teams to university-funded status, a 12% disparity would still exist between female participation in intercollegiate athletics and female representation in the student body, resulting in a failure to satisfy prong one. Therefore, it is most likely that even Brown could find that prong three offers protection for its intercollegiate athletic program where prong one does not.

and 44 Fed. Reg. at 71,417-18 ("Effective Accommodation of Student Interests and Abilities"). I will then evaluate the "equal treatment" of Brown's teams by applying the remaining nine factors of the regulation's ten "Equal Opportunity" factors pursuant to 34 C.F.R. 106.41(c)(2)-(10) and 44 Fed. Reg. at 71,415-17 ("Equivalence in Other Athletic Benefits and Opportunities").

A. Prong One Applied

Plaintiffs have proven that Brown does not satisfy prong one. The gender balance of Brown's intercollegiate athletic program is far from substantially proportionate to its student enrollment. As discussed above, Brown University provides 555 (61.87%) intercollegiate athletic opportunities to men and 342 (38.13%) to women, whereas the undergraduate enrollment for the relevant year is 2796 men (48.86%) and 2926 women (51.14%).[53] Brown currently offers 479 university-funded varsity slots for men and 312 university-funded varsity slots for women. It also provides 76 donor-funded varsity slots for men and 30 donor-funded varsity slots for women. Thus, because Brown maintains a 13.01% disparity between female participation in intercollegiate athletics and female student enrollment, it cannot gain the protection of prong one. Although Brown clearly does not meet the criteria of the first prong, defendants will still prevail if they can demonstrate that they satisfy the requirements of the second prong or if plaintiffs are unable to meet their burden of proof on prong three.

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[53] As I determined above, *see supra* part VI.A.1, "intercollegiate athletic participation opportunities" are measured by counting the number of participants on both university and donor-funded varsity teams. In Brown's case, the most accurate, if imperfect, participation numbers appear on the NCAA Squad Lists. *See supra* note 16 and accompanying text.

B. Prong Two Applied

Although Brown University has an impressive *history* of program expansion, defendants have failed to demonstrate that the University has maintained a *continuing practice* of intercollegiate program expansion for women, the underrepresented sex. As I noted at the preliminary injunction stage, Brown substantially expanded its athletic program for women in the 1970s. However, while I recognize that Brown has improved the quality of its women's program, the fact remains that since 1977 only women's indoor track in 1982 and women's skiing in 1994 have been added to its intercollegiate athletic program. Because merely reducing program offerings to the overrepresented sex does not constitute program "expansion," *see supra* part VI.A.2, the fact that Brown has eliminated or demoted several men's teams does not amount to a continuing practice of program expansion for women. In any case, Brown has not proven that the percentage of women participating in intercollegiate athletics has increased. Since the 1970s, the percentage of women participating in Brown's varsity athletic program has remained remarkably steady. *See Cohen*, 809 F.Supp. at 991.

C. Prong Three Applied

Prong three would excuse Brown's failure to provide substantially proportionate participation opportunities only if Brown fully and effectively accommodated the underrepresented sex. Here, the underrepresented sex is women and thus I focus my attention on the extent to which Brown's women athletes are accommodated. I find Brown has not *fully* and effectively accommodated the interest and ability of the underrepresented sex "to the extent necessary to provide equal opportunity in the selection of sports and levels of competition available to members of both sexes." 44 Fed. Reg. at 71,417.

Plaintiffs have successfully established that Brown has not fully and effectively accommodated the interest and

abilities of women, the underrepresented sex at Brown. In its affirmance of this Court's ruling on the preliminary injunction, the First Circuit recognized the potential difficulty in identifying "interest and ability" where student plaintiffs seek the creation or elevation to varsity status of an entirely new team. *See Cohen*, 991 F.2d at 904. Here, however, plaintiffs have introduced the testimony of student athletes, coaches and experts to verify that at least four existing teams have long been participating in competitive schedules and are capable of competing at Brown's highest varsity level. There are interested women able to compete at the university-funded varsity level in gymnastics, fencing, skiing, and water polo.[54]

Brown fails to comply with prong three in two respects. First, Brown has failed to increase the number of intercollegiate participation opportunities available to the underrepresented sex where it could do so by elevating a team with demonstrated interest and ability from below intercollegiate status to intercollegiate status. Specifically, I find that Brown has failed to accommodate fully and effectively the underrepresented sex by maintaining women's water polo at club status and by demoting women's gymnastics where these teams have demonstrated the interest and ability to operate as varsity teams. I have already determined that the women's water polo team operates as a traditional club sport rather than as an "intercollegiate" team under the definition of the Policy Interpretation. *See supra* note 28 and accompanying text. I have also determined that although gym-

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[54] The record demonstrates that the women's water polo team has the interest and ability to compete as a university-funded varsity team; however, the evidence does not demonstrate that this club team presently operates as an intercollegiate team. I note that the fact that this team does not engage in prong one's definition of "intercollegiate competition" does not mean that it, by definition, cannot demonstrate the interest and ability under prong three to do so if upgraded.

nastics is technically a donor-funded varsity at this time, it will in fact cease to exist, within a few seasons, at an intercollegiate varsity level in the absence of university funding. Neither team can compete as an intercollegiate varsity team if denied university-funded status. *See supra* part II. Thus, Brown violates prong three by maintaining women's water polo at club status and by, in effect, demoting women's gymnastics to club status, although officially designating it a "donor-funded" varsity team.

Second, Brown has failed to maintain and support women's donor-funded teams at Brown's highest level, thus preventing the athletes on these teams from developing fully their competitive abilities and athletic skills. Specifically, I find that Brown has failed to accommodate fully and effectively the underrepresented sex by maintaining women's fencing and women's skiing at a donor-funded level where each of these teams has demonstrated the interest and ability to operate as a university-funded varsity team and where donor-funded status has prevented each of these teams from reaching its athletic potential. Even though both athletic tiers offer participation opportunities in Brown's "intercollegiate" program, I have already determined that there are substantial qualitative differences between university and donor-funded teams. The differences preserved by Brown rise to such a level that the women participating on donor-funded varsities are not being fully and effectively accommodated. Thus, Brown violates prong three by maintaining these two women's teams at the donor-funded varsity level.

I recognize that this second basis for finding a violation is a new application of prong three. However, while prong three has not yet been read by any court to require an institution to upgrade any teams from *within* its intercollegiate athletic program, no other court has been presented with the factual situation of an officially maintained, two-tiered intercollegiate program.

It is true that prong three's "full and effective accommodation" language could be read to require only that an institution elevate or create athletic program offerings for the underrepresented sex from *outside* of its present intercollegiate program. However, Brown has created two distinct levels of athletics within the Policy Interpretation's definition of "intercollegiate" athletics; this unique factual situation calls for a more comprehensive interpretation of the "full and effective accommodation" language of prong three. As the First Circuit noted, institutions "must remain vigilant, 'upgrading the competitive opportunities available to the historically disadvantaged sex as warranted by developing abilities among the athletes of that sex,' [44 Fed. Reg. at 71,418], until the opportunities for, and levels of, competition are equivalent by gender." *Cohen,* 991 F.2d at 898.

Brown's restructured athletic program cannot be used to shield it from liability when in truth and in fact it does not fully and effectively accommodate the women athletes participating on donor-funded teams. It would circumvent the spirit and meaning of the Policy Interpretation if a university could "fully and effectively" accommodate the underrepresented sex by creating a second-class varsity status. The three prong test establishes a standard of equality that requires Brown to provide substantially equal numbers of intercollegiate athletic opportunities for men and for women, unless Brown either (1) steadily increases the number of such opportunities for women under prong two, or (2) fully and effectively meets the athletic interest and ability of women under prong three such that Brown cannot further improve the athletic opportunities for women until their interest and abilities further develop. Clearly, the potential for athletic development and the level of competition of women's donor-funded teams are much less than that of university-funded teams; thus, women on the ski and fencing teams can be more fully accommodated within the structure of Brown's established varsity athletic program.

Finally, I note that, in this instance, Brown cannot excuse its failure to accommodate the interest and ability of the women athletes on these four teams by citing an absence of "a reasonable expectation that intercollegiate competition in [these sports] will be available within the institution's normal competitive regions." 44 Fed. Reg. at 71,418. The evidence demonstrates that adequate intercollegiate competition exists within Brown's normal competitive region for each of these four teams.[55]

D. Equal Treatment Factors Applied

There is an additional ground upon which to rest a finding of Title IX violation.

Brown's program offerings, as currently allocated by gender within the two-tiered structure of the intercollegiate varsity program violate the "treatment" aspect of the regulation. *See* 34 C.F.R. § 106.41(c)(2)-(10) ("Equal Opportunity" factors); 44 Fed. Reg. at 71,415-17 ("Equivalence in Other Athletic Benefits and Opportunities"). At Brown, far more male athletes are being supported at the university-funded varsity level than are female athletes, and thus, women receive less benefit from their intercollegiate varsity program as a whole than do men from their intercollegiate varsity program as a whole. This inequity is a consequence of the qualitative differences between the benefits enjoyed by university and donor-funded varsity teams. Donor-funded teams are not provided with treatment equivalent to that accorded university-funded teams with regard to at least the following

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[55] For discussion of Brown's varsity and club competitors in water polo, see Trial Tr. 10/3/94 at 24; Trial Tr. 10/3/94 at 61-2; and Pls.' Ex. 39. For discussion of Brown's varsity and club competitors in skiing, see Trial Tr. 9/28/94 at 29-30; and Trial Tr. 9/29/94 at 12-13. For discussion of Brown's varsity and club competitors in fencing, see Trial Tr. 11/21/94 at 26-29; Trial Tr. 9/27/94 at 8, 76, 78. For discussion of Brown's varsity and club competitors in gymnastics, see Trial Tr. 9/27/94 at 184-86.

factors: equipment and supplies (§ 106.41(c)(2)), travel and per diem allowance (§ 106.41(c)(4)), opportunity to receive coaching (§ 106.41(c)(5)), assignment and compensation of coaches (§ 106.41(c)(6)), and training services (§ 106.41(c)(8)). *See supra* notes 6-13, 29-30. These differences were not settled by the parties as to the donor-funded varsity teams since the Settlement Agreement does not resolve any *program-wide* treatment inequities. Rather, it settles only the relative support afforded to men's and women's university-funded teams as to which there is no dispute concerning their university-funded varsity status.

VIII. REMEDY

Having determined that Brown University is in violation of Title IX, I now address the remedy required. This Court has the authority to mandate specific relief. *See Franklin v. Gwinnett County Pub. Sch.*, 112 S.Ct. 1028, 1035-37 (1992). However, as I stated in my earlier ruling, I have no desire to "micromanage" Brown's athletic program. Furthermore, I believe that judicial restraint is warranted at this point in light of the wide latitude afforded institutions under the regulations. Title IX does not require an institution to provide *any* athletic opportunities to its students. What it does require is that an institution provide equal opportunity to both genders in any program it chooses to offer. Thus, "Brown may not . . . operate an intercollegiate program that disproportionately provides greater participation opportunities to one sex in relation to undergraduate enrollments, where there is no evidence of continuing program expansion [for the underrepresented sex] or effective accommodation of the interests and abilities" of the underrepresented sex. *Cohen*, 809 F.Supp. at 999.

Brown may achieve compliance with Title IX in a number of ways. It may eliminate its athletic program altogether, it may elevate or create the requisite number

of women's positions, it may demote or eliminate the requisite number of men's positions, or it may implement a combination of these remedies. I leave it entirely to Brown's discretion to decide how it will balance its program to provide equal opportunities for its men and women athletes. I recognize the financial constraints Brown faces; however, its own priorities will necessarily determine the path to compliance it elects to take.

Defendants frequently raised the specter of being forced by financial constraints to eliminate men's athletic opportunities in order to achieve compliance under plaintiffs' interpretation of the law. I feel compelled to point out that an institution has much flexibility, even within a finite resource base. Dr. Lopiano was asked whether it would be prudent for a university confronted with severe budgetary conrtaints to cap the size of men's teams rather than add women's teams to its athletic program. She responded, addressing the false dichotomy posed:

> I believe that philosophically in any case where you have a previously disadvantaged population that you're trying to bring up to snuff to the advantaged population, that it's a bad idea to bring the advantaged population down to the level of the disadvantaged population. [T]he whole idea [of Title IX] is to add participation opportunities for women. And it's unfortunate that across the country that in the name of maintaining the standard of living of football team[s] or the standard of living of one or two special men's sports, that men's sports are being cut and women's gender equity under Title IX [is] being blamed for that.

Trial Tr. 12/2/94 at 59.

Thus, defendants' plea that "[t]here is nothing further Brown can do except cut, cap or eliminate men's teams," Defs.' Post-Trial Mem. at 39, is simply not true. Brown certainly retains the option to redistribute its resources

in a way that may slightly reduce the "standard of living" for its university-funded varsity sports in order to expand the participation opportunities for its women athletes and closer approach equal opportunity between its male and female athletes. Whether it will follow this course of action is, of course, well within its discretion.

IX. CONCLUSION

For all of the reasons stated above, Brown University is in volation of Title IX and supporting regulations.

Brown University is hereby ordered to submit to this Court, within 120 days, a comprehensive plan for complying with Title IX. This portion of the order is stayed pending appeal.

It is hereby further ordered that, in the interim, the preliminary injunction, as outlined in my Opinion and Order of December 22, 1992, *Cohen v. Brown Univ.*, 809 F.Supp. 978, 1001 (D.R.I. 1992), will remain in full force and effect.

So Ordered:

/s/ Raymond J. Pettine
Raymond J. Pettine
Senior U.S. District Judge

March 29, 1995

Entered as an Order of this Court March 29, 1995.

/s/ Celeste-Anne Patnaude
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

Civil Action No. 92-197-P

AMY COHEN, *et al*, each individually and
on behalf of all others similarly situated

v.

BROWN UNIVERSITY, VARTAN GREGORIAN,
and DAVID ROACH

JUDGMENT

☒ Decision by the Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Judgment entered for the Plaintiffs on March 29, 1995, in accordance with the Opinion of this Court of that date, is amended in accordance with the Modified Order of this Court filed May 4, 1995.

/s/ Raymond J. Pettine
RAYMOND J. PETTINE
Senior U.S. Judge

Date: May 4, 1995

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

Civil Action No. 92-0197-P

AMY COHEN, *et al.*, each individually and on behalf of all others similarly situated,
Plaintiffs

v.

BROWN UNIVERSITY, VARTAN GREGORIAN, and DAVID ROACH,
Defendants

JUDGMENT IN A CIVIL CASE

☒ Decision by the Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Judgment is hereby entered for the Plaintiffs in accordance with the Opinion and Order entered March 20, 1995, by Senior U.S. District Judge Raymond J. Pettine.

Approved:

RAYMOND F. BURGHARDT
Clerk of Court

/s/ Raymond J. Pettine
Sr. Judge 4/5/95
Date: March 29, 1995
nun pro tunc 3/29/95

/s/ Celeste-Anne Patnaude
(by) Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

C.A. No. 92-0197

AMY COHEN, *et al.*, each individually and on behalf of all others similarly situated,
plaintiffs,

v.

BROWN UNIVERSITY, VARTAN GREGORIAN, and DAVID ROACH,
defendants.

MODIFIED ORDER

PETTINE, RAYMOND J., Senior U.S. District Judge

Defendants have appealed this Court's Opinion and Order issued on March 29, 1995. Plaintiffs now assert that the judgment is not yet appealable as a final judgment pursuant to 28 U.S.C. § 1291 in that this Court stayed the requirement that defendants submit a compliance plan pending appeal. Plaintiffs contend that the First Circuit may therefore decline to hear the case for lack of appellate jurisdiction. Plaintiffs move, pursuant to Fed.R.Civ.P. 59 and 60, to vacate or amend this Court's judgment in order to ensure the jurisdiction of the appellate court over this case and thereby secure efficient disposition of the case on appeal. Although this is not a clearly defined area in the First Circuit, I am persuaded by plaintiffs' arguments and the interests of the public in expediting an appellate decision in this case. Therefore, the Order will be modified as set forth below.

The jurisdiction of the courts of appeals is normally confined to the review of final orders, 28 U.S.C. § 1291 (1976), or to the classes of interlocutory orders described in 28 U.S.C. § 1292(a) (1976). Plaintiffs contend that this Court's Order is not a "final" judgment within the meaning of 28 U.S.C. § 1291.[1] This Court ordered Brown University to submit a comprehensive plan within 120 days for complying with Title IX. I stayed this order pending appeal.

The traditional definition of a final order is "one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States,* 324 U.S. 229, 233 (1945). However, the Supreme Court has recognized a "twilight zone of finality," *Gillespie v. United States Steel Corp.,* 379 U.S. 148, 152 (1946), and has determined that finality should be given a 'particular rather than a technical construction.' " *Massachusetts Ass'n for Retarded Citizens v. King,* 643 F.2d 899, 904 n.12 (1st Cir. 1981) (citing *Gillespie,* 379 U.S. at 152. *See also Brown Shoe Co. v. United States,* 370 U.S. 294, 306 (1962) (noting that "[a] pragmatic approach to the question of finality has been considered essential to the achievement of the 'just, speedy, and inexpensive determination of every action' ") (footnote omitted).

While it is often difficult to assess finality in practical terms, numerous courts have found that a judgment ordering a remedial plan is not "final" for the purposes of appellate court review. *See, e.g., Inmates of Allegheny County Jail v. Wecht,* 874 F.2d 147, 155-56 (3d Cir.) (order requiring county officials to prepare a plan for construction of new jail facility not appealable), *vacated on*

[1] 28 U.S.C. § 1291 provides that:

> The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court. . . .

other grounds, 493 U.S. 948 (1989); *Balla v. Idaho State Bd. of Corrections,* 869 F.2d 461, 464 (9th Cir. 1989) (order containing a declaration of legal principles as well as a requirement to submit a plan which would establish a psychiatric care program for prisoners was, by its own terms, incomplete); *Sherpell v. Humnoke Sch. Dist.,* 814 F.2d 538, 539-40 (8th Cir. 1987) (order finding school environment racially discriminatory and ordering formation of biracial committee as well as formulation and submission of remedial plans not appealable under section 1291); *Groseclose v. Dutton,* 788 F.2d 356, 358-61 (6th Cir. 1986) (court order finding death row conditions unconstitutional and ordering nomination of a master and submission of a remedial plan not for a final judgment); *Hoots v. Commonwealth of Pa.,* 587 F.2d 1340, 1347-1348 (3d Cir. 1978) (order requiring defendants to prepare and submit a plan for desegregation was neither a final order nor an appealable interlocutory order which could vest the court with appellate jurisdiction); *Taylor v. Board of Educ.,* 288 F.2d 600, 601-02 (2d Cir.) (order directing school board to submit desegregation plan not appealable), *aff'd,* 294 F.2d 36 (2d Cir.), *cert. denied,* 368 U.S. 940 (1961). Although courts have also found some orders requiring submission of remedial plans to be "final" judgments, the parameters of "finality" in the context of remedial plans are not well-settled in the First Circuit. As the Supreme Court has noted, "final" in the context of appealability is sometimes an "abstruse and infinitely uncertain term." *Will v. United States,* 389 U.S. 90, 108 (1967) (Black, J., concurring). Therefore, in the interest of promoting judicial economy and providing the appellate court with certain jurisdiction, this Court will modify its Order of March 29, 1995.

Only that portion of the Opinion and Order requiring Brown University to submit, within 120 days, a comprehensive plan for complying with Title IX, and staying this requirement, is modified. It is hereby ordered that defendants submit to this Court for approval a compre-

hensive plan for compliance with Title IX within 60 days, and this Order is effective immediately. I recognize that this modification places Brown in a different position that I initially sought to avoid in the original Order. However, after defendants submit a plan that is approved by this Court, they may protect their interests by applying to this Court or the Court of Appeals for a stay of execution of the plan pursuant to Fed.R.App.P. 8(a) and Fed. R.Civ.P. 62. *See, e.g., Isla Petroleum Corp. v. Dep't of Consumer Affairs,* 640 F.Supp. 474, 517-19 (D.P.R. 1986), *rev'd on other grounds,* 485 U.S. 495 (1988).

SO ORDERED:

/s/ Raymond J. Pettine
RAYMOND J. PETTINE
Senior U.S. District Judge

May 3, 1995

Entered as an Order of this Court May 4, 1995.

/s/ Celeste-Anne Patnaude
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

C.A. No. 92-0197 P

AMY COHEN, *et. al*, each Individually and on Behalf of all Others Similarly Situated,
Plaintiffs,

v.

BROWN UNIVERSITY, VARTAN GREGORIAN, and DAVID ROACH,
Defendants.

ORDER

In *Cohen v. Brown University*, 879 F.Supp. 185 (D.R.I. 1995) this Court found that Brown's varsity athletic program violates Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 (1988) ("Title IX"). I subsequently ordered the defendants to "submit to this Court for approval a comprehensive plan for compliance with Title IX. . . ." Modified Order, May 4, 1995 at 4. Presently before this Court is the defendants' proposed compliance plan. Having found that the plan is not comprehensive in scope and that it fails to comply with this Court's Order, I now reject the defendants' plan and order specific relief in its place.

I.

The requirements of Title IX are set forth in exhaustive detail in *Cohen*, 879 F.Supp. 185.[1] In the interest of pro-

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[1] The Opinion and Order of March 29, 1995 addressed a number of points raised by defendants in their Memorandum in Response to Plaintiffs' Objection to Compliance Plan. I am dismayed to find arguments presented as if they were novel and heretofore not

viding a clear record, I will briefly summarize the findings of fact and conclusions of law presented in that opinion.

Title IX is given specific meaning by the Department of Education's Office of Civil Rights' regulations and Policy Interpretation. The trial and subsequent Opinion and Order of March 29, 1995 focused on whether Brown's athletic program met the requirements of the Policy Interpretation's three prong test.

Brown University's two-tiered varsity athletic program [2] (i.e., university-funded and donor-funded varsities) failed to satisfy any prong of the Policy Interpretation's three prong test. Prong One: This Court concluded that "intercollegiate level participation opportunities for male and female students" are not "provided in numbers substantially proportionate to their respective enrollments" at Brown. *Cohen*, 879 F.Supp. at 200 (citing 44 Fed.Reg. at 71,418). From the NCAA squad lists maintained by Brown, I determined that Brown provides 555 (61.87%) intercollegiate athletic opportunities to men but provides only 342 (38.13%) to women. The student body consists of 2796 (48.86%) men and 2926 (51.14%) women. Because Brown maintains a 13.01% disparity between female participation in intercollegiate athletics and female student enrollment, the gender balance of Brown's varsity program (including both university-funded varsities and donor-funded varsities) does not *substantially mirror* the gender balance of Brown's student body. On the contrary, men enjoy a disproportionate share of the varsity athletic positions afforded to Brown University students. Rather than reiterate the discussion of prong

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considered by the Court when in fact they were explicitly discussed in the Opinion. For example, defendants suggest that if this Court were truly interested in counting "intercollegiate opportunities" as defined by the Office of Civil Rights, it would include at least three women's club teams. However, as I specifically detailed in *Cohen*, 879 F.Supp. at 200 n.29, this position is untenable.

[2] For a discussion of the structure of Brown's intercollegiate program and the differences between university-funded and donor-funded varsities, see *Cohen*, 879 F.Supp. at 189.

one contained in the Opinion and Order of March 29, 1995, I call the reader's attention to *Cohen,* 879 F.Supp. at 199-207, 211.

Prong Two: Defendants failed to demonstrate that Brown has maintained a history and *continuing practice* of intercollegiate program expansion for women, the underrepresented sex. Thus, defendants' intercollegiate athletic program does not satisfy prong two. For a more detailed analysis of this facet of the Policy Interpretation, see *Cohen,* 879 F.Supp. at 207, 211.

Prong Three: Finally, I determined that Brown's current athletic program, which favors its male students, is not justified under Title IX by prong three. *See Cohen,* 879 F.Supp. at 207-209, 211-213. A university can comply with the third prong by "fully and effectively" meeting the athletic interest and ability of the underrepresented sex. As noted in *Cohen,* 879 F.Supp. at 212-13, the potential for athletic development and the level of competition of women's club and donor-funded teams are much less than that of university-funded teams.[3] The weight of

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[3] I recognize that there appears to be a contradiction in counting donor-funded teams as providing "intercollegiate" participation opportunities for the purposes of prong one, while finding that such teams do not satisfy the "full and effective" accommodation standard of prong three. However, because of the distinct purposes served by each prong and the unique character of Brown's two-tiered athletic program, donor-funded teams properly play different roles in prong one and prong three analyses. *See Cohen,* 879 F.Supp. at 212-13.

Brown has chosen to create a bifurcated varsity program, rendering policy interpretation analysis more complicated than in most Title IX "equal opportunity" cases. However:

> Brown's restructured athletic program cannot be used to shield it from liability when in truth and in fact it does not fully and effectively accommodate the women athletes participating on donor-funded teams. It would circumvent the spirit and meaning of the Policy Interpretation if a university could "fully and

the evidence at trial conclusively demonstrated that four established women's teams (donor-funded gymnastics, skiing, fencing and club water polo), presently excluded from university-funded varsity status by Brown, are capable of competing at Brown's highest varsity level. Therefore, Brown has not "fully and effectively accommodated" the underrepresented sex in its intercollegiate program.

To comply with the Opinion and Order of March 29, 1995 and the Modified Order of May 4, 1995, Brown submitted a proposed plan. The defendants' plan, however, is deficient in a number of respects and cannot be accepted by this Court.

II.

Brown states that its plan is designed to provide "substantially proportionate participation opportunities" (prong one) at the university-funded varsity level. Brown proposes to achieve this goal in two phases. In Phase I, defendants propose to use three different methods to reduce the number of men and increase the number of women participating in varsity athletics. Implementation of the plan would reduce the number of men participating in varsity athletics by limiting squad sizes on *men's* teams only.[4] Execution of the defendants' plan purports to increase the number of women participating in varsity athletics by (1) requiring all head coaches to field squads that meet minimum size requirements set by the athletic department, irrespective of the actual needs of the team (this condition will primarily affect the women's programs); and (2) adding new junior varsity teams to the women's basketball, lacrosse, soccer, and tennis programs.

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effectively" accommodate the underrepresented sex by creating a second-class varsity status.

Cohen, 879 F.Supp. at 213.

[4] Brown intends to enforce this policy by having the athletic director strike names from a coach's roster if team size exceeds the maximum limit set forth in the compliance plan.

In the event that the Court finds this part of the plan (Phase I) insufficient to achieve substantial proportionality under prong one, defendants additionally propose, in Phase II, to eliminate men's teams in order to reach substantial proportionality under prong one.

Defendants' Phase I is fatally flawed in two respects. First, it purports to achieve compliance with prong one (substantial proportionality), but in doing so it disregards donor-funded varsity teams. Because 76 men participated on donor-funded varsities while only 30 women participated on donor-funded varsities, men constitute an even greater percentage of the donor-funded athletes (71.7%) than they do of the university-funded athletes (60.56%). Thus, simply by ignoring all donor-funded varsity programs, defendants improve their total female varsity participation numbers from 38.13% (when both tiers are included) to 39.44% (when only university-funded varsities are included).

The defendants' plan thus disregards the Opinion and Order, which manifestly held that the donor-funded varsity teams, as established at Brown, do qualify under the Policy Interpretation's definition of "intercollegiate competition" even though they are maintained at inferior levels of support and competition. The plan presented by defendants must be rejected; any genuine plan for compliance would, at the very least, address participation in the entire intercollegiate program—including both varsity tiers.

Second, and more significantly, the proposed plan artificially boosts women's *varsity* numbers by adding *junior varsity* positions on four women's teams. Positions on district junior varsity squads do not qualify as "intercollegiate competition" opportunities under the Policy Interpretation and should not be included in defendants' plan. As noted in *Cohen*, 879 F.Supp. at 200, "intercollegiate" teams are those that "regularly participate in varsity competition." *See* 44 Fed.Reg. at 71,413 n.1. Junior varsity

squads, by definition, do not meet this criterion. Counting new women's junior varsity positions as equivalent to men's full varsity positions flagrantly violates the spirit and letter of Title IX; in no sense is an institution providing equal opportunity if it affords varsity positions to men but junior varsity positions to women.[5] Attempting to pad the women's varsity participation numbers in this way indicates a regrettable lack of interest in providing an intercollegiate athletic experience for its female students that is equivalent to that provided to its male students.[6]

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[5] Although Brown has attempted to characterize its proposed creation of junior varsity positions as additions to the varsity teams, this Court cannot accept such representations. These new positions would, in some cases, double the teams' effective maximums (as revealed in coaches' sworn testimony at trial). Defendants argue that this Court must count new women's junior varsity positions as varsity opportunities because the Opinion and Order of March 29, 1995 counted even varsity "benchwarmers" as varsity participants. I remind the defendants that the Opinion deferred to the judgment of the students *and coaches* that all members of varsity teams, as demonstrated by their very membership, enjoyed worthwhile varsity experiences. Now, however, the University seeks to override the judgment of the coaches and students as to how many worthwhile varsity experiences may be enjoyed on a team without impairing the team's level of competition. The University cannot achieve compliance merely by flooding women's teams with members in excess of the coaches' limits, maintaining that the capacity on women's teams is whatever the University says it is.

[6] Defendants suggest that if this Court rejects the new junior varsity positions because they unrealistically inflate the women's varsity rosters, then the Court must also reduce its calculation of men's varsity participation numbers. Defendants ask:

> Where better to apply that politically charged appellation ["massively overstocked"] than the bloated roster of men's track, which has been as high as 75? Of Ice Hockey, which has carried as many as 50 players? Or, most "massively overstocked" of all, Football, which has carried as many as 147 players?

Mem. in Resp. to Pls.' Obj. to Compliance Plan at 10-11. Defendants conveniently overlook the fact that the size of these men's teams was set by the coaches' personal preferences—no more

Contrary to Brown's representations, *see* Mem. in Resp. to Pls.' Obj. to Compliance Plan at 7-9, men's separate junior varsity teams were not counted in *Cohen*, 879 F.Supp. 214 as affording intercollegiate varsity opportunities to men. Brown's statements to the contrary are completely unfounded.[7]

These first two elements of the plan, which disregard the explicit language of the March 29, 1995 Opinion, are more than sufficient to suggest that defendants have not made a good faith effort to comply with this Court's mandate. However, I also note that Brown's proposal to cut members of men's teams and require coaches to maintain more members on certain (mostly women's) teams could, depending on details not included in the "comprehensive" plan for compliance, also render the proposal invalid. An institution does not provide equal opportunity if it caps its men's teams after they are well-stocked with

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players were retained on these teams than were welcomed by the coaches. Furthermore, defendants' position that these teams were unnecessarily and unrealistically large directly contradicts the very arguments they presented at trial. For example, Brown vociferously defended the size of the football team, justifying its numbers by pointing to the special nature of the sport: the high rate of injury, the substantial number of specialized positions, and the need to scrimmage in practice. To now suggest that these large numbers render the team "massively overstocked" is disingenuous. *See also supra* note 5.

[7] Brown argues that if this Court refuses to count women's junior varsity positions as intercollegiate participation opportunities, then, to be consistent the Court must eliminate a number of players from the varsity football total to account for 'junior varsity' members. This statement is gravely misleading because the football team at Brown is a single, integrated varsity team. Although there are a group of players that are referred to as "junior varsity," these players function on a varsity level. For example, the football team is coached as a single unit and the "junior varsity" members are essential to the functioning of the varsity team. In the words of the former head football coach, "We were all one team." Trial Tr. 12/7/94 at 109.

high-caliber recruits while requiring women's teams to boost numbers by accepting walk-ons. A university does not treat its men's and women's teams equally if it allows the coaches of men's teams to set their own maximum capacity limits but overrides the judgment of coaches of women's teams on the same matter.[8]

Finally, as I have already explained in *Cohen*, 879 F. Supp. at 210, I cannot agree with Brown that Title IX imposes a quota system,[9] as that team has traditionally been understood. As *Cohen*, 879 F.Supp. at 210 detailed in language that Brown insists upon disregarding, the Title IX redmedial scheme is fundamentally different from traditional affirmative action programs. Quotas, as commonly understood, require that established positions, which would otherwise have no official gender or racial requirements, be filled with members of a disadvantaged group, even if such candidates are believed to be less qualified than majority group applicants. Title IX, in contrast, requires institutions to establish proportionate numbers of athletic opportunities for each gender where the institution chooses to field *separate* teams for each gender, to the extent that there is the interest *and ability* to field

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[8] Brown's plan to require a minimum number of female participants, regardless of interest and ability, on existing varsity teams more nearly enacts quotas and preferential treatment than do the measures that defendants so vigorously resist. Creating teams, in which there is unsatisfied interest and ability, that will provide a more equal number of positions for men and women, and allowing *all* coaches to determine the ideal size of such teams imposes no advantages or disadvantages on either gender. However, for the athletic department to interfere, in a gender-specific way, with the coaches' decisions imposes unfair advantages and disadvantages.

[9] Thus I give no credence to defendants' statement that "The Court's analysis, based upon [the Policy Interpretation] is cast in considerable doubt as a model for an ongoing remedy in this case by [a recent memorandum of President Clinton] which, *inter alia*, requires elimination of any programs which create a quota, create preferences for unqualified individuals or create reverse discrimination." *See* Mem. in Resp. to Pls.' Obj. to Compliance Plan at 1.

an equal number of athletic positions. To field substantially proportionate numbers of athletic positions for each gender, where this is possible, can hardly be said to impose advantages or disadvantages on one gender or the other. Rather, the statute *eradicates* advantages and disadvantages imposed on the basis of gender.

Both plaintiffs and defendants are correct: the litigation in this case has dragged on long enough. It is my understanding from the text of Brown's proposed plan that the institution has three primary goals in complying with this Court's order. The University wants to save as many men's positions as possible, invest no additional money in its intercollegiate athletic program, and proceed to the Court of Appeals without further delay. *See* Mem. in Resp. to Pls.' Obj. to Compliance Plan at 2, 4. Defendants state in the plan that their Phase II (elimination of men's teams) exists as a supplement to Phase I, in the event that Phase I is found to be insufficient to achieve compliance. However, given that this Court has found Phase I to be wholly inadequate, implementation of Phase II at this juncture would result in massive demotion of men's teams. It is clear that this outcome would defeat the University's goals. While the specter of severe cuts in the men's program lends a dramatic quality to Brown's position on Title IX, drastic reduction in the men's program is totally unnecessary.

Brown would have been in compliance with this Court's Opinion and Order if its plan had met the requirements of any of the three prongs delineated above. Unfortunately, Brown's proposed plan to comply with prong one fails to meet the criteria of prong one. In the interest of avoiding "protracted litigation over a compliance plan," Mem. in Resp. to Pls.' Obj. to Compliance Plan at 13, and expediting the appeal process, I will order specific relief consistent with Brown's stated objectives.

I have concluded that Brown's stated objectives will be best served if I design a remedy to meet the requirements

of prong three rather than prong one. In order to bring Brown into compliance with prong one under defendants' Phase II, I would have to order Brown to cut enough men's teams to eradicate approximately 213 men's varsity positions. This extreme action is entirely unnecessary. The easy answer lies in ordering Brown to comply with prong three by upgrading the women's gymnastics, fencing, skiing, and water polo teams to university-funded varsity status. In this way, Brown could easily achieve prong three's standard of "full and effective accommodation of the underrepresented sex." This remedy would entail upgrading the positions of approximately 40 women. In order to finance the 40 additional women's positions, Brown certainly will not have to eliminate as many as the 213 men's positions that would be cut under Brown's Phase II proposal. Thus, Brown will fully comply with Title IX by meeting the standards of prong three, without approaching satisfaction of the standards of prong one.

It is clearly in the best interest of both the male and the female athletes to have an increase in women's opportunities and a small decrease in men's opportunities, if necessary, rather than, as under Brown's plan, *no* increase in women's opportunities and a *large* decrease in men's opportunities. Expanding women's athletic opportunities in areas where there is proven ability and interest is the very purpose of Title IX and the simplest, least disruptive, route to Title IX compliance at Brown.

III.

Defendants' proposed compliance plan is hereby rejected. Brown University is ordered to elevate and maintain women's gymnastics, women's water polo, women's skiing, and women's fencing to university-funded varsity status. This part of the order is stayed pending appeal. In the interim, the preliminary injunction, enjoining Brown from eliminating or reducing in status any existing women's varsity team, more fully outlined in my Opinion and

Order of December 22, 1992, *Cohen v. Brown Univ.*, 809 F.Supp. 978, 1001 (D.R.I. 1992), will remain in full force and effect.

So ORDERED:

/s/ Raymond J. Pettine
RAYMOND J. PETTINE
Senior U.S. District Judge

August 16, 1995

Entered as an Order of this Court August 17, 1995.

/s/ Celeste-Anne Patnaude
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

C.A. No. 92-0197 P

AMY COHEN, *et al.*,

v. *Plaintiffs*,

BROWN UNIVERSITY, VARTAN GREGORIAN, and DAVID ROACH,

Defendants.

JUDGMENT

Folowing the issuance of the Order of August 17, 1995, this Court received a proposed judgment and order from the plaintiffs. The defendants objected. After consideration, this Court issues the following judgment:

It is ordered and adjudged: Judgment is hereby entered for the plaintiffs in accordance with the Opinion and Order entered March 29, 1995 and as modified by the Order of August 17, 1995. The Order of August 17, 1995 states:

> Brown University is ordered to elevate and maintain women's gymnastics, women's water polo, women's skiing, and women's fencing to university-funded status. This part of the Order is stayed pending appeal. In the interim, the preliminary injunction, enjoining Brown from eliminating or reducing in status any existing women's varsity team, more fully outlined in my Opinion and Order of December 22, 1992, *Cohen v. Brown Univ.*, 809 F.Supp. 978, 1001 (D.R.I. 1992), will remain in full force and effect.

That order is now final.

SO ORDERED:

/s/ Raymond J. Pettine
RAYMOND J. PETTINE
Senior U.S. District Judge

August 31, 1995

Entered as an Order of this Court Sept. 1, 1995.

/s/ Celeste-Anne Patnaude
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 92-2483

AMY COHEN, *et al.*,
Plaintiffs, Appellees,

v.

BROWN UNIVERSITY, *et al.*,
Defendants, Appellants.

Appeal from the United States District Court
for the District of Rhode Island
[Hon. Raymond J. Pettine, *Senior U.S. District Judge*]

Before
Selya, Cyr and Stahl, *Circuit Judges.*

SELYA, *Circuit Judge.* In this watershed case, defendants-appellants Brown University, Vartan Gregorian, and David Roach appeal from the district court's issuance of a preliminary injunction ordering Brown to reinstate its women's gymnastics and volleyball programs to full intercollegiate varsity status pending the resolution of a Title IX claim.[1] *See Cohen* v. *Brown Univ.*, 809

[1] The individual defendants are, respectively, the President and Athletic Director of the University. Each is sued in his official

F. Supp. 978 (D.R.I. 1992). After mapping Title IX's rugged legal terrain and cutting a passable swath through the factual thicket that overspreads the parties' arguments, we affirm.

I. BROWN ATHLETICS: AN OVERVIEW

College athletics, particularly in the realm of football and basketball, has traditionally occupied a prominent role in American sports and American society. For college students, athletics offers an opportunity to exacuate leadership skills, learn teamwork, build self-confidence, and perfect self-discipline. In addition, for many student-athletes, physical skills are a passport to college admissions and scholarships, allowing them to attend otherwise inaccessible schools. These opportunities, and the lessons learned on the playing fields, are invaluable in attaining career and life successes in and out of professional sports.

The highway of opportunity runs in both directions. Not only student-athletes, but universities, too, benefit from the magic of intercollegiate sports. Successful teams generate television revenues and gate receipts which often fund significant percentages of a university's overall athletic program, offering students the opportuity to partake of sports that are not financially self-sustaining. Even those institutions whose teams do not fill the grandstands of cavernous stadiums or attract national television exposure benefit from increased student and almuni cohesion and the support it engenders. Thus, universities nurture the legends, great or small, inhering in their athletic past, polishing the hardware that adorns field-house trophy cases and reliving heroic exploits in the pages of alumni magazines.

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capacity. For ease in reference, we discuss this appeal as if Brown was the sole defendant and appellant. Nonetheless, our opinion applies equally to all parties.

In these terms, Brown will never be confused with Notre Dame or the more muscular members of the Big Ten. Although its football team did play in the 1916 Rose Bowl and its men's basketball team won the Ivy League championship as recently as 1986, Brown's athletic program has only occasionally achieved national prominence or, for that matter, enjoyed sustained success.[2] Moreover, at Brown, as at most schools, women are a relatively inconspicuous part of the storied athletic past. Historically, colleges limited athletics to the male sphere, leaving those few women's teams that sprouted to scrounge for resources.

The absence of women's athletics at Brown was, until 1970, an ineluctable consequence of the absence of women; Brown sponsored a women's college—Pembroke—but did not itself admit women. In 1971, Brown subsumed Pembroke. Brown promptly upgraded Pembroke's rather primitive athletic offerings so that by 1977 there were fourteen women's varsity teams. In subsequent years, Brown added only one distaff team: winter track. Hence, in the 1991-92 academic year, Brown fielded fifteen women's teams—one fewer than the number of men's varsity teams.

II. THE PLAINTIFF CLASS

In the spring of 1991, Brown announced that it, like many other schools, was in a financial bind, and that, as a belt-tightening measure, it planned to drop four sports from its intercollegiate varsity athletic roster: women's volleyball and gymnastics, men's golf and water polo. The University permitted the teams to continue playing as "intercollegiate clubs," a status that allowed them to compete against varsity teams from other colleges,[3] but cut off

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[2] We note, not without a certain irony, that the now-demoted women's volleyball and gymnastics teams won Ivy League championships in 1988 and 1990, respectively.

[3] As a practical matter, many schools with varsity squads are reluctant to compete against club teams. This case aptly illustrates

financial subsidies and support services routinely available to varsity teams (*e.g.*, salaried coaches, access to prime facilities, preferred practice time, medical trainers, clerical assistance, office support, admission preferences, and the like). Brown estimated that eliminating these four varsity teams would save $77,813 per annum, broken down as follows: women's volleyball, $37,127; women's gymnastics, $24,901; men's water polo, $9,250; men's golf, $6,545.

Before the cuts, Brown athletics offered an aggregate of 328 varsity slots for female athletes and 566 varsity slots for male atheltes. Thus, women had 36.7% of the athletic opportunities and men 63.3%. Abolishing the four varsity teams took substantially more dollars from women's athletic budget than from the men's budget, but did not materially affect the athletic opportunity ratios; women retained 36.6% of the opportunities and men 63.4%. At that time (and for a number of years prior thereto), Brown's student body comprised approximately 52% men and 48% women.

Folowing Brown's announcement of the cutbacks, disappointed members of the women's volleyball and gymnastics teams brought suit. They proceeded on an implied cause of action under Title IX, 20 U.S.C. §§ 1681-1688 (1988). *See Franklin* v. *Gwinnett County Pub. Sch.*, 112 S. Ct. 1028, 1032 (1992) (recognizing implied private right of action under Title IX); *Cannon* v. *University of Chicago*, 441 U.S. 677, 717 (1979) (same); *see also Cannon*, 441 U.S. at 687 n.8 (holding that exhaustion of administrative remedies is not a prerequisite to a Title IX suit). The plaintiffs charged that Brown's athletic arrangements violated Title IX's ban on gender-based discrimination, a violation that was allegedly exacerbated by Brown's decision to devalue the two wom-

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the point. As soon as Brown demoted its women's volleyball team from varsity to club status, Northeastern University and West Point declined to include Brown on future volleyball schedules. *See Cohen*, 809 F. Supp. at 993.

en's programs without first making sufficient reductions in men's activities or, in the alternative, adding other women's teams to compensate for the loss.

On plaintiffs' motion, the district court certified a class of "all present and future Brown University women students and potential students who participate, seek to participate, and/or are deterred from participating in intercollegiate athletics funded by Brown." And, after hearing fourteen days of testimony from twenty witnesses, the judge granted a preliminary injunction requiring Brown to reinstate the two men's teams pending the outcome of a full trial on the merits. *See Cohen*, 809 F. Supp. at 1001. We stayed execution of the order and expedited Brown's appeal.

III. TITLE IX AND COLLEGIATE ATHLETICS

Title IX prohibits gender-based discrimination by educational institutions receiving federal financial support—in practice, the vast majority of all accredited colleges and universities. The statute sketches wide policy lines, leaving the details to regulating agencies. Since this appeal demands that we invade *terra incognita*,[4] we carefully recount the developments leading to the present version of Title IX and then examine the pertinent statutory and regulatory language.

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[4] Although there has been a spate of sports-related Title IX suits during the last two years, *see* Andrew Blum, *Athletics in the Courts*, Nat'l L.J., Apr. 5, 1993, at 1, few have been fully litigated. *See, e.g.*, Carol Herwig, *Massachusetts Reinstates Women's Sports*, USA Today, Oct. 22, 1992, at 14C (announcing agreement to reinstate three women's teams at the University of Massachusetts and reporting the school's intention to become "the first unversity in the country to come into full compliance with Title IX"). While the case we decide today is apparently the first of these to reach the courts of appeals, others are pending. *See, e.g., Roberts* v. *Colorado State Univ.*, No. 93-1052 (10th Cir. 1993) (not yet argued); *Cook* v. *Colgate Univ.*, No. 92-9175 (2d Cir. 1993) (argued Feb. 26, 1993).

A. *Scope of Title IX.*

At its inception, the broad proscriptive language of Title IX caused considerable consternation in the academic world. The academy's anxiety chiefly centered around identifying which individual programs, particularly in terms of athletics, might come within the scope of the discrimination provision, and, relatedly, how the government would determine compliance. The gridiron fueled these concerns: for many schools, the men's football budget far exceeded that of any other sport, and men's athletics as a whole received the lion's share of dedicated resources—a share that, typically, was vastly disproportionate to the percentage of men in the student body.

Part of the confusion about the scope of Title IX's coverage and the acceptable avenues of compliance arose from the absence of secondary legislative materials. Congress included no committee report with the final bill and there were apparently only two mentions of intercollegiate athletics during the congressional debate. *See* 118 Cong. Rec. 5,807 (1972) (statement of Sen. Bayh on privacy in athletic facilities); 117 Cong. Rec. 30,407 (1971) (statement of Sen. Bayh noting that proposed Title IX will not require gender-blended football teams). Nevertheless, under congressional direction to implement Title IX, the Secretary of Health, Education and Welfare (HEW) promulgated regulations in 1975 which included specific provisions for college athletics. Four years later, HEW's Office of Civil Rights (OCR) added another layer of regulatory exegesis when, after notice and comment, it published a "Policy Interpretation" that offered a more detailed measure of equal athletic opportunity.

In 1984, the Supreme Court radically altered the contemporary reading of Title IX. The Court held that Title IX was "program-specific," so that its tenets applied only to the program(s) which actually received federal funds and not to the rest of the university. *Grove City College* v. *Bell*, 465 U.S. 555, 574 (1984). Because few athletic

departments are direct receipients of federal funds—most federal money for universities is channelled through financial aid offices or invested directly in research grants —*Grove City* cabined Title IX and placed virtually all collegiate athletic programs beyond its reach.[5]

In response to *Grove City*, Congress scrapped the program-specific approach and reinstated an institution-wide application of Title IX by passing the Civil Rights Restoration Act of 1987, 20 U.S.C. § 1687 (1988). The Restoration Act required that if any arm of an educational institution received federal funds, the institution as a whole must comply with Title IX's provisions. *See id.; see* also S. Rep. No. 64, 100th Cong., 2d Sess. 4 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3, 6 (explaining that Congress wanted to prohibit discrimination throughout an institution if the institution received any federal funds). Although the Restoration Act does not specifically mention sports, the record of the floor debate leaves little doubt that the enactment was aimed, in part, at creating a more level playing field for female athletes. *See, e.g.*, 130 Cong. Rec. S12,642 (daily ed. Oct. 2, 1984) (statement of Sen. Byrd decrying past discrimination against female athletes); 130 Cong. Rec. S11,253 (daily ed. Sept. 17, 1984) (statement of Sen. Hatch regarding importance of Title IX to ensuring development of women athletes); 130 Cong. Rec. S2,267 (daily ed. Mar. 2, 1984) (statement of Sen. Riegle noting extensive evidence of sex discrimination in education and athletics).

The appellants do not challenge the district court's finding that, under existing law, Brown's athletic department is subject to Title IX. Accordingly, we devote the remainder of Part III to deterrating the meaning of Title IX, looking first at the statute and then at the regulations.

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[5] Following the Court's decision in *Grove City*, the United States Department of Education (which by then had been spun off from HEW, *see infra* Part III(C)) dropped or curtailed seventy-nine ongoing Title IX cases. *See Statements on Civil Rights Restoration Act*, Daily Lab. Rep. (BNA) No. 53, at D1 (Mar. 20, 1981).

B. *Statutory Framework.*

Title IX, like the Restoration Act, does not explicitly treat college athletics.[6] Rather, the statute's heart is a broad prohibition of gender-based discrimination in all programmatic aspects of educational institutions:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .

20 U.S.C. § 1681(a) (1988). After listing a number of exempt organizations, section 1681 makes clear that, while Title IX prohibits discrimination, it does not mandate strict numerical equality between the gender balance of a college's athletic program and the gender balance of its student body. Thus, section 1681(a) shall not

> be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: *Provided,* That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

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[6] This lacuna apparently results from a political compromise. After the Conference Committee deleted an amendment to Title IX that would have have exempted "revenue-producing" athletics, Congress asked the Secretary of HEW to provide regulations specifically governing athletics. *See* 44 Fed. Reg. 71,413 (1979).

20 U.S.C. § 1681(b) (1988). Put another way, a court assessing Title IX compliance may not find a violation *solely* because there is a disparity between the gender composition of an educational institution's student constituency, on the one hand, and its athletic programs, on the other hand.

That is not to say, however, that evidence of such a disparity is irrelevant. Quite the contrary: under the proviso contained in section 1681(b), a Title IX plaintiff in an athletic discrimination suit must accompany statistical evidence of disparate impact with some further evidence of discrimination, such as unmet need amongst the members of the disadvantaged gender.

C. *Regulatory Framework.*

As we mentioned above, the Secretary of HEW, following Congress's instructions, promulgated regulations implementing Title IX in the pre-*Grove City* era. *See* 40 Fed. Reg. 24,128 (1975). Thereafter, in 1979, Congress split HEW into the Department of Health and Human Services (HHS) and the Department of Education (DED). *See* 20 U.S.C. §§ 3401-3510 (1988). In a wonderful example of bureaucratic muddle, the existing Title IX regulations were left within HHS's arsenal while, at the same time, DED replicated them as part of its own regulatory armamentarium. *Compare* 45 C.F.R. § 86 (1992) (HHS regulations) with 34 C.F.R. § 106 (1992) (DED regulations). Both sets of regulations were still in effect when the Restoration Act passed. They are identical, save only for changes in nomenclature reflecting the reorganization of the federal bureaucracy.

In short, like pretenders to the emirate of a deceased sheik, both HHS and DED lay an hereditary claim to this oasis which arises from the regulatory desert, asserting authority to enforce Title IX. Nevertheless, DED is the principle locus of ongoing enforcement activity. *See* 20 U.S.C. § 3441(a)(1) (transferring all education func-

tions of HEW to DED); *see also* 20 U.S.C. § 3441(a)(3) (transferring education-related OCR work to DED). Therefore, like the parties, we treat DED, acting through its OCR, as the administrative agency charged with administering Title IX.[7]

Recognizing the agency's role has important practical and legal consequences. Although DED is not a party to this appeal, we must accord its interpretation of Title IX appreciable deference. *See Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984); *see also Udall* v. *Tallman*, 380 U.S. 1, 16 (1965) (noting that the Supreme Court "gives great deference to the interpretation given the statute by the officers or agency charged with its administration") The degree of deference is particularly high in Title IX cases because Congress explicitly delegated to the agency the task of prescribing standards for athletic programs under Title IX. *See* Pub. L. No. 93-380, § 844, 88 Stat. 612 (1974); *see also Chevron*, 467 U.S. at 844 (holding that where Congress has explicitly delegated responsibility to any agency, the regulation deserves "controlling weight"); *Batterton* v. *Francis*, 432 U.S. 416, 425 (1977); *Alvarez-Flores* v. *INS*, 909 F.2d 1, 3 (1st Cir. 1990).

It is against this backdrop that we scrutinize the regulations and the Policy Interpretation.

1. *The Regulations.* DED's regulations begin by detailing Title IX's application to college athletics.[8] The

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[7] From this point forward, we use the acronym "OCR" to refer to DED's Office of Civil Rights which took on the education-related portfolio of HEW's Office of Civil Rights in May, 1980. *See* 20 U.S.C. 3441(a)(3).

[8] The regulations provide:

> No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

regulations also recognize, however, that an athletic program may consist of gender-segregated teams as long as one of two conditions is met: either the sport in which the team competes is a contact sport or the institution offers comparable teams in the sport to both genders. *See* 34 C.F.R. § 106.41(b).

Finally, whether teams are segregated by sex or not, the school must provide gender-blind equality of opportunity to its student body. The regulations offer a non-exclusive compendium of ten factors which OCR will consider in assessing compliance with this mandate:

> (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
>
> (2) The provision of equipment and supplies;
>
> (3) Scheduling of games and practice time;
>
> (4) Travel and per diem allowance;
>
> (5) Opportunity to receive coaching and academic tutoring;
>
> (6) Assignment and compensation of coaches and tutors;
>
> (7) Provision of locker rooms, practice and competitive facilities;
>
> (8) Provision of medical and training facilities and services;
>
> (9) Provision of housing and dining facilities and services;
>
> (10) Publicity.

34 C.F.R. § 106.41(c) (1992).[9] The district court

[9] The same regulation also stipulates that:

> Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient

rested its preliminary injunction on the first of these ten areas of inquiry: Brown's failure effectively to accommodate the interests and abilities of female students in the selection and level of sports. *See Cohen*, 809 F. Supp. at 994. Hence, this area is the most critical in terms of evaluating the charges against Brown (although it is also the most difficult to measure).

2. *The Policy Interpretation.* In the three years next following the initial issuance of the regulations, HEW received over one hundred discrimination complaints involving more than fifty schools. In order to encourage self-policing and thereby winnow complaints, HEW proposed a Policy Interpretation. *See* 43 Fed. Reg. 58,070 (1978). It then promulgated the Policy Interpretation in final form, *see* 44 Fed. Reg. 71,413 (1979), a matter of months before the effective date of the statute through which Congress, emulating King Solomon, split HEW. The parties are in agreement that, at DED's birth, it clutched the Policy Interpretation, and, as a practical matter, that appears to be the case.[10] *See, e.g.*, DED, *Title IX Athletics Investigator's Manual* 1, 2 (1990) (Manual); *see also* Complaint Letter from Regional Civil Rights Director, DED, to Dr. Martin Massengale, Chancellor, Univ. of Nebraska (July 10, 1989) (noting that DED "ha[s] followed the directions provided in the Policy Interpretation"); Complaint Letter from Regional Civil Rights Director, DED, to Dr. Charles A. Walker, Chan-

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> operates or sponsors separate teams will not constitute noncompliance with this section, but [DED] may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

34 C.F.R. § 106.41(c) (1992).

[10] Congress clearly assigned HEW's regulatory duties in education to the nascent DED. *See* 20 U.S.C. § 3441. Moreover, in taking up its mantle, DED adopted exactly the regulation which the Policy Interpretation purported to interpret—sending an unmistakably clear signal of the agency's satisfaction with the Policy Interpretation.

cellor, Univ. of Arkansas (Sept. 1, 1989) (same). Although we can find no record that DED formally adopted the Policy Interpretation, we see no point to splitting the hair, particularly where the parties have not asked us to do so. Because this document is a considered interpretation of the regulation, we cede it substantial deference. *See Martin* v. *OSHRC*, 111 S. Ct. 1171, 1175-76 (1991); *Gardebring* v. *Jenkins*, 485 U.S. 415, 430 (1988).

In line with the Supreme Court's direction that, "if we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language," *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 521 (1982) (quoting *United States* v. *Price*, 383 U.S. 787, 801 (1966)) (collecting cases) (brackets in original), the Policy Interpretation limns three major areas of regulatory compliance: [11] "Athletic Financial Assistance (Scholarships)," *see* 34 C.F.R. § 106.37(c); "Equivalence in Other Athletic Benefits and Opportunities," *see* 34 C.F.R. § 106.41(c)(2)-(10); and "Effective Accommodation of Student Interests and Abilities," *see* 34 C.F.R. § 106.41 (c)(1). The court below, *see Cohen*, 809 F. Supp. at 989, and a number of other district courts, *see, e.g.*, *Roberts* v. *Colorado State Univ.*, —— F. Supp. ——, —— (D. Colo. 1993) [No. 92-Z-1310, slip op. at 3]; *Favia* v. *Indiana Univ. of Pa.*, No. 92-2045, 1992 WL 436239, at *7 (W.D. Pa. Feb. 4, 1993), have adopted this formulation and ruled that a university violates Title IX if it ineffectively accommodates student interests and abilities regardless of its performance in other Title IX areas.

Equal opportunity to participate lies at the core of Title IX's purpose. Because the third compliance area delineates this heartland, we agree with the district courts

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[11] The Manual divides Title IX coverage into the same three areas and notes that "an investigation may be limited to less than all three of these major areas." Manual at 7.

that have so ruled and hold that, with regard to the effective accommodation of students' interests and abilities, an institution can violate Title IX even if it meets the "financial assistance" and "athletic equivalence" standards. In other words, an institution that offers women a smaller number of athletic opportunities than the statute requires may not rectify that violation simply by lavishing more resources on those women or achieving equivalence in other respects.[12]

3. *Measuring Effective Accommodation.* The parties agree that the third compliance area is the field on which this appeal must be fought. In surveying the dimensions of this battleground, that is, whether an athletic program effectively accommodates students' interests and abilities, the Policy Interpretation maps a Trinitarian model under which the university must meet at least one of three benchmarks:

> (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
>
> (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
>
> (3) Where the members of one sex are underrepresented among intercollegiate athletes, and the

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[12] In any event, both the financial assistance and athletic equivalence standards are inapposite for present purposes. As to the former, Brown does not confer athletic scholarships and the plaintiffs do not allege that Brown has discriminated by gender in distributing other financial aid. As to the latter, the district court made only preliminary findings, *see Cohen*, 809 F. Supp. at 994-97, on the explicit understanding that it would revisit compliance *vel non* with the athletic equivalence standard at trial. *Id.* at 997.

> institution cannot show a continuing practic of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

44 Fed. Reg. at 71,418. The first benchmark furnishes a safe harbor for those institutions that have distributed athletic opportunities in numbers "substantially proportionate" to the gender composition of their student bodies. Thus, a university which does not wish to engage in extensive compliance analysis may stay on the sunny side of Title IX simply by maintaining gender parity between its student body and its athletic lineup.

The second and third parts of the accommodation test recognize that there are circumstances under which, as a practical matter, something short of this proportionality is a satisfactory proxy for gender balance. For example, so long as a university is continually expanding athletic opportunities in an ongoing effort to meet the needs of the underrepresented gender, and persists in this approach as interest and ability levels in its student body and secondary feeder schools rise, benchmark two is satisfied and Title IX does not require that the university leap to complete gender parity in a single bound. Or, if a school has a student body in which one sex is demonstrably less interested in athletics, Title IX does not require that the school create teams for, or rain money upon, otherwise disinterested students; rather, the third benchmark is satisfied if the underrepresented sex's discernible interests are fully and effectively accommodated.[18]

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[18] OCR also lists a series of illustrative justifications for the disparate treatment of men's and women's athletic teams, including (1) sports that require more resources because of the nature of the game (*e.g.*, contact sports generally require more equipment), (2) special circumstances, such as an influx of first-year players, that may require an extraordinary infusion of resources, (3) special operational expenses (*e.g.*, crowd control at a basketball

It seems unlikely, even in this day and age, that the athletic establishments of many coeducational universities reflect the gender balance of their student bodies.[14] Similarly, the recent boom in Title IX suits suggests that, in an era of fiscal austerity, few universities are prone to expand athletic opportunities. It is not surprising, then, that schools more often than not attempt to manage the rigors of Title IX by satisfying the interests and abilities of the underrepresented gender, that is, by meeting the third benchmarks of the accommodation test. Yet, this benchmark sets a high standard: it demands not merely some accommodation, but full and effective accommodation. If there is sufficient interest and ability among members of the statistically underrepresented gender, not slaked by existing programs, an institution necessarily fails this prong of the test.

Although the full-and-effective-accommodation standard is high, it is not absolute. Even when male athletic opportunities outnumber female athletic opportunities, and the university has not met the first benchmark (substantial statistical proportionality) or the second benchmark (continuing program expansion) of the accommodation test, the mere fact that there are some female students interested in a sport does not *ipso facto* require the school to provide a varsity team in order to comply with the third benchmark. Rather, the institution can satisfy the

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tournament), as long as special operational expense needs are met for both genders and (4) affirmative measures to remedy past limitations on athletic opportunities for one gender. 44 Fed. Reg. at 71,415-16.

[14] Success in this regard is, however, attainable. After Washington State University was ordered to increase participation opportunities for women to a level equivalent with the percentage of female undergraduates, *see Blair* v. *Washington State Univ.*, 740 P.2d 1379 (Wash. 1987), the University experienced considerable success in meeting court-ordered goals. *See* Mary Jordan, *Only One School Meets Gender Equity Goal*, Wash. Post. June 21, 1992, at D1.

third benchmark by ensuring participatory opportunities at the intercollegiate level when, and to the extent that, there is "sufficient interest and ability among the members of the excluded sex to sustain a viable team and a reasonable expectation of intercollegiate competition for that team . . . ." 44 Fed. Reg. at 71,418. Staying on top of the problem is not sport for the short-winded: the institution must remain vigilant, "upgrading the competitive opportunities available to the historically disadvantaged sex as warranted by developing abilities among the athletes of that sex," *id.*, until the opportunities for, and levels of, competition are equivalent by gender.[15]

Brown argues that DED's Policy Interpretation, construed as we have just outlined, goes so far afield that it countervails the enabling legislation. Brown suggests that, to the extent students' interests in athletics are disproportionate by gender, colleges should be allowed to meet those interests incompletely as long as the school's response is in direct proportion to the comparative levels of interest. Put bluntly, Brown reads the "full" out of the duty to accommodate "fully and effectively." It argues instead that an institution satisfactorily accommodates female athletes if it allocates athletic opportunities to women *in accordance with the ratio of interested and able women to interested and able men*, regardless of the number of unserved women or the percentage of the student body that they comprise.

Because this is mountainous terrain, an example may serve to clarify the distinction between Brown's proposal

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[15] If in the course of adding and upgrading teams, a university attains gender parity between its athletic program and its student body, it meets the first benchmark of the accommodation test. But, Title IX does not require that a school pour ever-increasing sums into its athletic establishment. If a university prefers to take another route, it can also bring itself into compliance with the first benchmark of the accommodation test by subtraction and downgrading, that is, by reducing opportunities for the overrepresented gender while keeping opportunities stable for the underrepresented gender (or reducing them to a much less extent).

and our understanding of the law. Suppose a university (Oooh U.) has a student body consisting of 1,000 men and 1,000 women, a one to one ratio. If 500 men and 250 women are able and interested athletes, the ratio of interested men to interested women is two to one. Brown takes the position that both the actual gender composition of the student body and whether there is unmet interest among the underrepresented gender are irrelevant; in order to satisfy the third benchmark, Oooh U. must only provide athletic opportunities in line with the two to one interested athlete ratio, say, 100 slots for men and 50 slots for women. Under this view, the interest of 200 women would be unmet—but there would be no Title IX violation.

We think that Brown's perception of the Title IX universe is myopic. The fact that the overrepresented gender is less than fully accommodated will not, in and of itself, excuse a shortfall in the provision of opportunities for the underrepresented gender. Rather, the law requires that, in the absence of continuing program expansion (benchmark two), schools either meet benchmark one by providing athletic opportunities in proportion to the gender composition of the student body (in Oooh U.'s case, a roughly equal number of slots for men and women, as the student body is equally divided), or meet benchmark three by fully accommodating interested athletes among the underrepresented sex (providing, at Oooh U., 250 slots for women).[16]

In the final analysis, Brown's view is wrong on two scores. It is wrong as a matter of law, for DED's Policy Interpretation, which requires full accommodation of the underrepresented gender, draws its essence from the stat-

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[16] Of course, if Oooh U. takes the benchmark three route, it will also have to provide at least the same number of slots for men; but, so long as women remain the underrepresented gender and their interests are fully accommodated, the university can provide as many (or as few) additional slots for men as it sees fit.

ute. Whether Brown's concept might be thought more attractive, or whether we, if writing on a pristine page, would craft the regulation in a manner different than the agency, are not very important considerations. Because the agency's rendition stands upon a plausible, if not inevitable, reading of Title IX, we are obligated to enforce the regulation according to its tenor. *See Chevron*, 467 U.S. at 843 n.11 (holding that a "court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold [it]") (collecting cases); *Massachusetts* v. *Secretary of Agric.*, 984 F.2d 514, 522 (1st Cir. 1993) (similar).

Brown's reading of Title IX is legally flawed for yet another reason. It proceeds from the premise that the agency's third benchmark countervails Title IX. But, this particular imprecation of the third benchmark overlooks the accommodation test's general purposes: to determine whether a student has been "excluded from participation in, [or] denied the benefits of" an athletic program "on the basis of sex . . . ." 20 U.S.C. § 1681(a). While any single element of this tripartite test, in isolation, might not achieve the goal set by the statute, the test as a whole is reasonably constructed to implement the statute. No more is exigible. *See Chemical Mfrs. Ass'n* v. *Natural Resources Defense Council, Inc.*, 470 U.S. 116, 125 (1985).

As it happens, Brown's view is also poor policy for, in the long run, a rule such as Brown advances would likely make it more difficult for colleges to ensure that they have complied with Title IX. Given that the survey of interests and abilities would begin under circumstances where men's athletic teams have a considerable head start, such a rule would almost certainly blunt the exhortation that schools should "take into account the nationally increasing levels of women's interests and abilities" and avoid "disadvantag[ing] members of an underrepresented sex . . . ." 44 Fed. Reg. at 71,417.

Brown's proposal would also aggravate the quantification problems that are inevitably bound up with Title IX. Student plaintiffs, who carry the burden of proof on this issue, as well as universities monitoring self-compliance, would be required to assess the level of interest in both the male and female student populations and determine comparatively how completely the university was serving the interests of each sex. By contrast, as we read the accommodation test's third benchmark, it requires a relatively simple assessment of whether there is unmet need in the underrepresented gender that rises to a level sufficient to warrant a new team or the upgrading of an existing team. We think the simpler reading is far more serviceable.

Furthermore, by moving away from OCR's third benchmark, which focuses on the levels of interest and ability extant in the student body, Brown's theory invites thorny questions as to the appropriate survey population, whether from the university, typical feeder schools, or the regional community. In that way, Brown's proposal would do little more than overcomplicate an already complex equation.

We will not paint the lily. Brown's approach cannot withstand scrutiny on either legal or policy grounds. We conclude that DED's Policy Interpretation means exactly what it says. This plain meaning is a proper, permissible rendition of the statute.

IV. THE CONSTITUTIONAL CHALLENGE

We turn to a series of case-specific issues, starting with Brown's constitutional challenge to the statutory scheme.

A. *Equal Protection.*

Brown asseverates that if the third part of the accommodation test is read as OCR wrote it—to require full

and effective accommodation of the underrepresented gender—the test violates the Fifth Amendment's Equal Protection Clause. We think not.

Brown assumes that full and effective accommodation disadvantages male athletes.[17] While it might well be that more men than women at Brown are currently interested in sports, Brown points to no evidence in the record that men are any more likely to engage in athletics than women, absent socialization and disparate opportunities. In the absence of any proof supporting Brown's claim, and in view of congressional and administrative urging that women, given the opportunity, will naturally participate in athletics in numbers equal to men, we do not find that the regulation, when read in the commonsense manner that its language suggests, *see supra* Part III(C)(3), offends the Fifth Amendment.

What is more, even if we were to assume, for argument's sake, that the regulation creates a gender classification slanted somewhat in favor of women, we would find no constitutional infirmity. It is clear that Congress has broad powers under the Fifth Amendment to remedy past discrimination. *See, e.g., Metro Broadcasting, Inc.* v. *FCC*, 110 S. Ct. 2997, 3009 (1990) (noting that Congress need not make specific findings of discrimination to grant race-conscious relief); *Califano* v. *Webster*, 430 U.S. 313, 317 (1977) (upholding social security wage law that benefitted women in part because its purpose was "the permissible one of redressing our society's longstanding disparate treatment of women"). Despite the little legislative history regarding discrimination in collegiate

[17] In characterizing Title IX as benefitting *only* women, Brown takes a rather isthmian view of the world at large. After all, colleges that have converted from exclusively female enrollment to coeducational enrollment face situations inverse to Brown's. In such a setting, the men's athletic program may well be underdeveloped, or underfunded, or both, while fiscal retrenchment offers

athletics that emerged during the consideration of Title IX, Congress did hold "extensive hearings on higher education" when Title IX was pending, in the course of which "much testimony was heard with respect to discrimination against women in higher education." H.R. Rep. No. 554, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 2462, 2511. Athletics featured even more prominently in Congress's decision to reverse the *Grove City* rule *See supra* pp. 8-9. Under these circumstances, we find Brown's plaint unbecoming.

B. *Affirmative Action.*

Brown rehashes its equal protection arguments and serves it up as a nominally different dish, arguing that the district court's preliminary injunction constitutes "affirmative action" and violates the Equal Protection Clause because the court lacked a necessary factual predicate to warrant such a step.[18] It is, however, established beyond peradventure that, where no contrary legislative directive appears, the federal judiciary possesses the power to grant *any* appropriate relief on a cause of action appropriately brought pursuant to a federal statute.[19] *See Franklin*, 112 S. Ct. at 1035 (upholding damage remedy for Title

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no reprieve. Under these circumstances, Title IX would protect the athletic interests of men as the underrepresented sex.

[18] The "authority" that Brown cites in support of this proposition, *Regents of Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 307 (1978) (Powell, J. concurring), in fact suggests the propriety of affirmative relief where there are judicial findings of a statutory violation. *See id.*

[19] On this point, Brown cannot win even if its basic theories have merit. If the district court did not engage in the proper factfinding, then its order constitutes an abuse of its discretion. If, on the other hand, Title IX does not provide for equitable relief, the district court will have erred as a matter of law in choosing a remedy outside the statutory margins. In either event, given that the statute itself is compatible with the Equal Protection Clause, Brown cannot prevail *on its constitutional claim.*

IX violation and noting that prospective relief would be inadequate); *see also* Fed. R. Civ. P. 54(c). Hence, this initiative, too, is bootless.

V. BURDEN OF PROOF

In addition to its constitutional challenges, Brown questions the district court's allocation of the burden of proof. It suggests that the analytic model of burden setting and shifting commonly accepted in Title VII and ADEA cases, *see, e.g., Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 254 (1981); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802-05 (1973); *Mesnick* v. *General Elec. Co.*, 950 F.2d 816, 823 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 2965 (1992), is ripe for importation into the precincts patrolled by Title IX. We reject the suggestion.

In our view, there is no need to search for analogies where, as in the Title IX milieu, the controlling statutes and regulations are clear. To invoke the prophylaxis of Title IX, the statute, 20 U.S.C. § 1681(b), and the regulations, read together, require a Title IX plaintiff to show disparity betwen the gender composition of the institution's student body and its athletic program, thereby proving that there is an underrepresented gender. Then, the plaintiff must show that a second element—unmet interest—is present. In other words, the plaintiff must prove that the underrepresented gender has not been "fully and effectively accommodated by the present program." 44 Fed. Reg. at 71,418. If the plaintiff carries the devoir of persuasion on these two elements, she has proven her case unless the university shows, as an affirmative defense, "a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members" of the underrepresented gender. *Id.*

Over and beyond the express dictates of the applicable statute and regulations, there is another valid reason for

eschewing the Title VII paradigm in most Title IX cases. The scope and purpose of Title IX, which merely conditions government grants to educational institutions, are substantially different from those of Title VII, which sets basic employment standards. *See Franklin* v. *Gwinnett County Pub. Sch.*, 911 F.2d 617, 622 (11th Cir. 1990) (declining to apply Title VII analysis to Title IX litigation), *aff'd*, 112 S. Ct. 1028 (1992). Title IX, while it applies only to schools that receive federal funds, influences almost all aspects of educational management. In contrast, Title VII applies to a much wider range of institutions—virtually all employers—but targets only employment-related matters. Moreover, Title IX is largely aspirational—on the whole, affected institutions choose how to accomplish the statutory goal—whereas Title VII is largely peremptory—covered employers must adhere to statutorily prescribed standards. Thus, the former is a loosely laced buskin, inhospitable to the specialized choreography of presumption and production which the *Burdine/McDonnell Douglas* burden-shifting framework depends.

We conclude, therefore, that excepting perhaps in the employment discrimination context, *see Lipsett* v. *University of P.R.*, 864 F.2d 881, 897 (1st Cir. 1988) (applying Title VII standards in Title IX case, but explicitly limiting the crossover to the employment context), the Title VII burden-of-proof rules do not apply in Title IX cases.[20] Consequently, a Title IX plaintiff makes out an athletic discrimination case by proving numerical disparity, coupled with unmet interest, each by a fair preponderance of the credible evidence, so long as the defendant does not rebut the plaintiff's showing by adducing preponderant history-and-practice evidence.

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[20] *But cf. Cook* v. *Colgate Univ.*, 802 F. Supp. 737, 743 (N.D.N.Y. 1992) (applying Title VII process to Title IX case at urging of parties). *Cook* is presently on appeal to the Second Circuit. *See supra* note 4.

VI. THE PRELIMINARY INJUNCTION

We come at long last to the cynosure of the appeal. This is familiar territory. A district court, faced with a motion for preliminary injunction, must assess the request in four particular ways, evaluating (1) the movant's probability of victory on the merits; (2) the potential for irreparable harm if the injunction is refused; (3) the balance of interests as between the parties, *i.e.*, whether the harm to the movant if the injunction is withheld outweighs the harm to the nonmovant if the injunction is granted; and (4) the public interest. *See Narragansett Indian Tribe* v. *Guilbert*, 934 F.2d 4, 5 (1st Cir. 1991); *Aoude* v. *Mobil Oil Corp.*, 862 F.2d 890, 892 (1st Cir. 1988); *Hypertherm, Inc.* v. *Precision Prods., Inc.*, 832 F.2d 697, 699 & n.2 (1st Cir. 1987). Of course, a district court's conclusions at the preliminary injunction stage are only attempts to predict probable outcomes. Thus, "a party losing the battle on likelihood of success may nonetheless win the war at a succeeding trial . . . ." *Guilbert*, 934 F.2d at 6.

If, in conducting this tamisage, the district court has made no clear error of law or fact, we will overturn its calibration of the four factors only for a manifest abuse of discretion. *See Weaver* v. *Henderson*, 984 F.2d 11, 12 (1st Cir. 1993); *Guilbert*, 934 F.2d at 5.

Here, the district court found that the quadrat of factors favored plaintiffs' position. *See Cohen*, 809 F. Supp. at 985-1001. Brown disagrees with these findings up and down the line, but offers developed argumentation only as to three of the four components. Because Brown does not explain its challenge to the district court's finding that the public interest would be disserved by leaving the two women's teams on the sidelines until the suit is finally resolved, we ignore its *pro forma* protest in that respect. Litigants cannot preserve an issue for appeal simply by raising a pennant and then moving on to another sub-

ject. *See United States* v. *Slade*, 980 F.2d 27, 30-31 & n.3 (1st Cir. 1992) (reiterating that theories not briefed or argued on appeal are waived); *Ryan* v. *Royal Ins. Co.*, 916 F.2d 731, 734 (1st Cir. 1990) (stating that "issues adverted to on appeal in a perfunctory manner, unaccompanied by some developed argumentation, are deemed to have been abandoned"). Accordingly, we limit our review to the three factors briefed and argued.

A. *Likelihood of Success.*

It is old hat, but still very much in fashion, that a movant's likelihood of success at trial is particularly influential in the preliminary injunction calculus. *See Weaver*, 984 F.2d at 12; *Guilbert*, 934 F.2d at 6; *Public Serv. Co.* v. *Town of West Newbury*, 835 F.2d 380, 383 (1st Cir. 1987). In this case, the district court paid meticulous attention to the parties' prospects for success over the long haul. The court plainly visualized both the factual intricacies and legal complexities that characterize Title IX litigation. It held a lengthy adversary hearing and reviewed voluminous written submissions. And at journey's end, it correctly focused on the three-part accommodation test.

The court faultlessly dispatched the first two elements of the test. With respect to the comparison between Brown's athletic agenda and student body, we adopt the lower court's record-rooted finding that the University did not meet—or even closely approach—the "substantial proportionality" threshold because it offered too few varsity opportunities for women. *See Cohen*, 809 F. Supp. at 991. Cognizant, perhaps, that the raw numbers tell an unambiguous tale, Brown does not challenge the inviolability of this finding.

As to the test's second part, the court below found that, although Brown could point to "impressive growth" in its women's athletic program in the 1970s, the school had

not continued filling the gap during the next two decades. *Id.* On this basis, the court concluded that Brown had not met the benchmark. *See id.* Brown asserts that the district court erred by not crediting it sufficiently for its dramatic expansion of women's sports in the 1970s, and we are not entirely unsympathetic to this plea. In the last analysis, however, this was a judgment call and the trial court's judgment was not unreasonable. While a university deserves appreciable applause for supercharging a low-voltage athletic program in one burst rather than powering it up over a longer period, such an energization, once undertaken, does not forever hold the institution harmless. Here, Brown labored for six years to weave a broad array of new activities into the fabric of its palestrian offerings. The district court apparently believed, however, that Brown then rested on its laurels for at least twice that long. The very length of this hiatus suggests something far short of a *continuing* practice of program expansion. And, moreover, a university must design expansion in whatever form and at whatever pace to respond to the flux and reflux of unserved interests. The court below found that Brown failed in this task. *See id.* The issue of responsiveness is fact-intensive and in most instances, as here, its resolution will be within the trier's province. We find no error, therefore, in the district court's resolution of the second aspect of the accommodation test.

The third benchmark presents a more problematic scenario. The district court incorrectly held that Brown bore the burden of showing that it had fully and effectively accommodated the interests and abilities of its women athletes. See id. at 997. Section 1681(b) requires that the plaintiffs, rather than the University, prove a shortfall in the full and effective accommodation of interested female athletes by showing, initially, both numercial disparity and unmet interest. *See supra* Part V. Nonetheless, we do not think that the court's bevue is

fatal. Even when a trial court has misconstrued the law, an appellate tribunal may avoid remanding if the record is sufficiently developed and the facts necessary to shape the proper legal matrix are sufficiently clear. *See, e.g., Societe Des Produits Nestle, S.A.* v. *Casa Helvetia, Inc.*, 982 F.2d 633, 642 (1st Cir. 1992) (coupling district court's factual findings with correct rule of law); *United States* v. *Mora*, 821 F.2d 860, 869 (1st Cir. 1987) (same); *see also Cameron* v. *Tomes*, —— F.2d ——, —— (1st Cir. 1993) [No. 92-1343, slip op. at 14-15] (using findings of fact made in the framework of an unacceptable legal analysis to affirm injunctive relief on a different legal theory).

We find this to be a particularly auspicious setting in which to employ such a device. Although the full and effective accommodation of athletic interests is likely to be a complicated issue where allegedly underrepresented plaintiffs sue to force a university to create a neoteric team or upgrade the status of a club team, *see, e.g., Cook*, 802 F. Supp. at 737, there is unlikely to be any comparably turbid question as to interest and ability where, as here, plaintiffs are seeking merely to forestall the interment of healthy varsity teams.

In this instance, the district court's subsidiary findings of fact render it beyond cavil that the plaintiffs carried their burden of proof. The court found, for example, that there was "great interest and talent" amongst Brown's female undergraduates which, following the cuts, would go unserved. *Cohen*, 809 F. Supp. at 992. Of particular moment, the court also found the interest and talent on campus ample to support women's varsity volleyball and gymnastics teams, *see id.*—a finding that is hardly surprising in view of the teams' robust health before the budget-cutters arrived on the scene. The court proceeded to note that, while club team can be equivalent to intercollegiate teams when they regularly

participate in varsity competition, *see* 44 Fed. Reg. at 71, 413 n.1, the teams that Brown downgraded would not regularly be competing against varsity teams and would suffer a diminution of status in a wide range of other significant respects. *See Cohen*, 809 F. Supp. at 992-93.

The potency of this evidence is an effective antidote to the district court's partial misapplication of the burden of proof. Because the record contains nothing that would allow a trier to find that Brown's athletic agenda reflects the makeup of its student body or that the plaintiff class is so poorly populated as to warrant a reduction in women's sports,[21] the court's error was harmless. In a nutshell, the plaintiffs met their challenge on parts one and three of the accommodation test. This conclusion, in partnership with the district court's supportable finding that Brown did not satisfactorily demonstrate a continuing expansion of its women's athletic lineup, strikes the gold. The court's prediction of plaintiffs' probable success was, therefore, adequately grounded.

B. *Irreparable Injury.*

The next area of inquiry is irreparable harm. The district court heard from a variety of athletic administration experts. The court concluded that, absent judicial intervention, the plaintiffs would suffer irremediable injury in at least three respects: competitive posture, recruitment, and loss of coaching. As club teams, the district court though women's volleyball and gymnastics would increasingly become less competitive, have fewer players, be unable to schedule varsity teams from other schools, become unattractive to potential stars making college choices, and suffer stagnation in the growth of individual talent due to the

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[21] It bears mentioning in this regard that Judge Pettine heard, and apparently credited, evidence indicating that there were other women's club teams sufficiently accomplished and populated to flourish as varsity squads. *Cohen*, 809 F. Supp. at 992.

absence of coaching.[22] *See Cohen,* 809 F. Supp. at 992-93. Certainly, these harms exist to some degree. In highly nuanced cases involving a melange of competing considerations, the aggregate injury, and whether or not it is irreparable, come primarily within the trial court's ken. *See K-Mart Corp.* v. *Oriental Plaza, Inc.,* 875 F.2d 907, 915 (1st Cir. 1989) (acknowledging that "[d]istrict courts have broad discretion to evaluate the irreparability of alleged harm") (citation omitted). So it is here. Although the types of harms the court catalogued might not all rise to the same level of seriousness, the overall record supports, even though it does not compel, the court's assessment of their cumulative severity. Given, especially, the lack of any other concinnous remedy *pendente lite,* we will not second-guess the district court's finding of irreparable injury.

C. *The Balance of Harms.*

Finally, the district court found that the competing equities weighed in favor of granting the injunction. After hearing testimony from Brown's Financial Vice-President and its Associate Athletic Director, the district court concluded that the cost of the interim injunction would be relatively slight; and that, in view of discretionary funds already contained in the Athletic Deuartment budget and a presidential "contingency fund," Brown possessed the wherewithal to defray the costs without undue hardship. *See Cohen,* 809 F. Supp. at 1000-01. By contrast, the court noted the volleyball and gymnastics programs' continuing deterioration in the aftermath of the demotion. *See id.* at 992-93. On balance, the court determined that the financial burden on Brown was tolerable, and, in any

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[22] Brown does not retain coaches for its club teams and few of the teams have the independent financial wherewithal to hire coaches. Here, the district court specifically found that if the gymnastics team was downgraded to club status, it would likely lose its paid coach when her contract expired in June of 1993. *Cohen,* 809 F. Supp. at 992.

event, was overbalanced by the potential harm to the plaintiff class if the court took no action.

Brown contests the results of this balancing on the premise that the district court wrongly discounted the testimony of one of its witnesses and did not adequately consider the possibility that false hopes might be raised by a preliminary injunction. It is, however, axiomatic that a district court, sitting without a jury, may selectively discount testimony as it weighs conflicting viewpoints and adjudicates the facts. *See Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 500 (1984); *Anthony* v. *Sundlun*, 952 F.2d 603, 606 (1st Cir. 1991). This is a trial court's prerogative and, indeed, its duty.

It is similarly fundamental that a preliminary injunction, by its very nature, is sometimes ephemeral. Hence, the risk that some observers might read into a temporary restrainer more than it eventually proves to mean is endemic to the equitable device and cannot tip the scales against its use in any particular circumstances. It defies elemental logic to say that parties who the court has determined will probably succeed at trial should be denied the interim relief to which they are entitled because their ultimate victory is less than absolutely certain.

In fine, the district court did not overspill its discretion either in taking Brown's self-interested description of its financial plight with a grain of salt or in limiting the role that raising false hopes might play in the equitable calculus.

D. *Summing Up.*

We summarize succinctly, beginning with the probability of plaintiffs' success. In an era where the practices of higher education must adjust to stunted revenues, careening costs, and changing demographics, colleges might well be obliged to curb spending on programs, like athletics, that do not lie at the epicenter of their institutional mis-

sion. Title IX does not purport to override financial necessity. Yet, the pruning of athletic budgets cannot take place solely in comptrollers' offices, isolated from the legislative and regulatory imperatives that Title IX imposes.

This case aptly illustrates the point. Brown earnestly professes that it has done no more than slash women's and men's athletics by approximately the same degree, and, indeed, the raw numbers lend partial credence to that characterization.[23] But, Brown's claim overlooks the shortcomings that plagued its program before it took blade in hand. If a school, like Brown, eschews the first two benchmarks of the accommodation test, electing to stray from substantial proportionality and failing to march uninterruptedly in the direction of equal athletic opportunity, it must comply with the third benchmark. To do so, the school must fully and effectively accommodate the underrepresented gender's interests and abilities, even if that requires it to give the underrepresented gender (in this case, women) what amounts to a larger slice of a shrinking athletic-opportunity pie.

The record reveals that the court below paid heed to these realities. It properly recognized that even balanced use of the budget-paring knife funs afoul of Title IX where, as here, the fruits of a university's athletic program remain ill-distributed after the trimming takes place. Because the district court understood this principle, and because its findings of fact as to the case's probable outcome are based on substantial evidence, the court's determination that plaintiffs are likely to succeed on the merits is inexpugnable.

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[23] We note, however, that while the cuts proposed by Brown eliminate a roughly equal number of athletic opportunities for women as for men, those cuts subtract roughly four times more money from the budget for female pancratiasts than from the budget for their male counterparts. *See supra* pp. 4-5. And, as a noted playwright once observed, "where there is no money, there is no change of any kind." Moss Hart, *Act One* (1959).

The district court displayed similar dexterity in touching the other three bases en route to a grant of injunctive relief: irreparability of injury, the relative weight of potential harms, and impact on the public interest. The court found that the harm to the plaintiff class was irremediable, absent prompt injunctive relief; that the balance of harms favored such relief; and that the overridnig public interest lay in the firm enforcement of Title IX. In each of these areas, as in the likelihood-of-success arena, the court made serial findings that, taken at face value, amply justify injunctive relief. Because these findings derive adequate support from the record, the court's decree must stand as long as the specific relief the court ordered was appropriate. It is to this issue that we now turn.

VII. REMEDIATION

After applying the preliminary injunction standard, the district court ordered relief *pendente lite,* temporarily reinstating the women's volleyball and gymnastics teams. Brown argues that such specific relief is inappropriate because it intrudes on Brown's discretion. The point has some cogency. We are a society that cherishes academic freedom and recognizes that universities deserve great leeway in their operations. *See, e.g., Wynne* v. *Tufts Univ. Sch. of Med.*, 976 F.2d 791, 795 (1st Cir. 1992), *petition for cert. filed* (Feb. 3, 1993); *Lamphere* v. *Brown Univ.*, 875 F.2d 916, 922 (1st Cir. 1989). In addition, Title IX does not require institutions to fund any particular number or type of athletic opportunities—only that they provide those opportunities in a nondiscriminatory fashion if they wish to receive federal funds.

Nonetheless, the district court has broad discretionary power to take provisional steps restoring the status quo pending the conclusion of a trial. *See Ricci* v. *Okin,* 978 F.2d 764, 767 (1st Cir. 1992); *Guilbert,* 934 F.2d at 7 & n.3. Considering the district court's proper estimation and deft application of the preliminary injunction stand-

ard, *see supra* Part VI, we think that requiring Brown to maintain the women's volleyball and gymnastics teams in varsity status for the time being is a remedial choice within the district court's discretion. That is not to say, however, that the same remedy will be suitable at trial's end if the Title IX charges prove out against Brown. The district court has noted, we believe appropriately, that if it ultimately finds Brown's athletic program to violate Title IX, it will initially require the University to propose a compliance plan rather than mandate the creation or deletion of particular athletic teams. *Cohen,* 809 F. Supp. at 1001. Although the district court has the power to order specific relief if the institution wishes to continue receiving federal funds, *see Franklin,* 112 S. Ct. at 1035, the many routes to Title IX compliance make specific relief most useful in situations where the institution, after a judicial determination of noncompliance, demonstrates an unwillingness or inability to exercise its discretion in a way that brings it into compliance with Title IX.

VIII. CONCLUSION

We need go no further. This litigation presents an array of complicated and important issues at a crossroads of the law that few courts have explored. The beacon by which we must steer is Congress's unmistakably clear mandate that educational institutions not use federal monies to perpetuate gender-based discrimination. At the same time, we must remain sensitive to the fact that suits of this genre implicate the discretion of universities to pursue their missions free from governmental interference and, in the bargain, to deploy increasingly scarce resources in the most advantageous way. These considerations, each of which is in service to desirable ends, are necessarily in tension in Title IX cases. Thus, there are unlikely to be ideal solutions to all the vexing problems that might potentially arise.

This appeal exemplifies many of the difficulties inherent in Title IX litigation. We do not presume to say that

the district court's interim solution is perfect, but it is fair and it is lawful. On the record compiled to date, the preliminary injunction requiring Brown to reinstate its women's volleyball and gymnastics teams for the time being came well within the encincture of judicial discreiton. We will not meddle.

The preliminary injunction is affirmed, the temporary stay is dissolved, and the cause is remanded to the district court for further proceedings. Costs to appellees.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

C.A. No. 92-197-P

AMY COHEN, EILEEN ROCCHIO, NICOLE A. TURGEON, KAREN A. MCDONALD, MELISSA KURODA, LISA C. STERN, JENNIFER HSU, JENNIFER E. CLOUD, DARCY SHEARER, JODY BUDGE, MEGAN HULL, KYLE HACKETT, EACH INDIVIDUALLY AND ON BEHALF OF ALL OTHER SIMILARLY SITUATED,

Plaintiffs,

v.

BROWN UNIVERSITY, VARTAN GREGORIAN, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF BROWN UNIVERSITY, AND DAVID ROACH, IN HIS OFFICIAL CAPACITY AS ATHLETIC DIRECTOR OF BROWN UNIVERSITY,

Defendants.

OPINION AND ORDER

PETTINE, RAYMOND J., Senior U.S. District Judge

I. *Introduction*

This is a class action lawsuit charging Brown University, its President, and its Athletic Director (collectively "defendants" or "Brown") with discriminating against women in the operation of its intercollegiate athletic program, in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.* ("Title IX"). The plaintiff class consists of all present and future Brown University women students and potential students who

participate, seek to participate, and/or are deterred from participating in intercollegiate athletics funded by Brown.

Named plaintiffs include student members of the women's gymnastics and volleyball teams at Brown. For almost twenty years, these two teams were accorded full varsity status. In May 1991, however, Brown reduced these two women's teams, along with two longstanding men's varsity squads, to "intercollegiate club" status. Plaintiffs charge that Browns demotion of the two women's teams has undermined their ability to compete in intercollegiate athletics and relegated the members of those teams to "second-class" status. More broadly, plaintiffs allege that Brown's actions have exacerbated the university's discriminatory treatment of women, particularly its continuing failure to provide women with equivalent "opportunities" to participate in intercollegiate athletics.

In two separate Orders, this Court previously granted plaintiffs' motion for class certification and denied defendants' motion to dismiss.[1] Plaintiffs now move for a preliminary injunction. Specifically, they seek a preliminary order: (1) reinstating the women's gymnastics and volleyball teams to full varsity status; and (2) prohibiting Brown from eliminating or reducing the status of any other Brown-funded women's intercollegiate athletic teams unless the percentage of "opportunities" to participate in intercollegiate athletics equals the percentage of women enrolled in the undergraduate program.

The parties presented a total of fourteen days of testimony and twenty witnesses on the prelimiary injunction motion. In addition, both sides have filed lengthy pre- and post-hearing briefs. After reviewing all of the evidence, and considering the arguments by both parties, I must grant injunctive relief, as specified at the conclusion

[1] This Court did, however, dismiss without prejudice plaintiffs' claim against defendant David Roach in his individual capacity.

of this opinion. Among other things, I direct Brown to immediately restore women's gymnastics and women's volleyball to their former status as fully funded intercollegiate varsity teams and to provide these teams with all of the incidental benefits accorded varsity teams at the university.

This case raises novel issues concerning Title IX and athletic programs. In addition, there is virtually no case-law on point. For these reasons, I have undertaken to explore at great length the factual and legal context of this case, including a detailed examination of the U.S. Department of Education's official Policy Interpretation of the athletic regulation promulgated under Title IX.

First, I will discuss the varsity athletic program at Brown and the change in status of the four teams. Next I will outline the legal and regulatory framework for athletic programs under Title IX. Finally, I will address the arguments advanced by both parties under the rubric of this Circuit's well-established preliminary injunction framework, emphasizing what I believe to be the Title IX standards applicable to this case.

II. *Factual Background*

Brown is a member of Division I of the National Collegiate Athletic Association ("NCAA"), the highest level within the NCAA structure. In academic year 1990-91, Brown funded a total of 31 varsity teams through its athletic department that participated in NCAA and other intercollegiate competition. Of these 31 teams, 16 were for men and 15 were for women. In eleven sports, Brown offered teams for both sexes:

Men and Women

(1) Basketball

(2) Crew

(3) Cross-Country

(4) Ice Hockey
(5) Lacrosse
(6) Soccer
(7) Squash
(8) Swimming
(9) Tennis
(10) Fall Track
(11) Spring Track

The remaining sports were confined to either the men's or women's athletic programs. These teams consisted of the following:

Men	*Women*
(1) Baseball	(1) Field Hockey
(2) Football	(2) Gymnastics
(3) Golf	(3) Softball
(4) Water Polo	(4) Volleyball
(5) Wrestling	

In 1990-91, there were a total of 894 men and women undergraduates competing on these 31 varsity teams. Of this total, 566 were men (63.3%) men and 328 were women (36.7%). Plaintiffs' Exhibit 3.[2] Records indicate that during this academic year, there were 2951 (52.4%)

[2] These figures are drawn from a 1991 Gender Equity Study prepared by Brown for the NCAA. According to the Study, there were a total of 541 men and 342 women participating in varsity level competition in 1990-91. However, these numbers included men's and women's fencing, which were treated as "club" sports during that year, not as funded varsity teams. In addition, the Study did not include members of freshman football, a team that was a fully-funded varsity squad. Thus, as suggested by plaintiffs, I have added an additional 50 men to approximate the freshman football team and omitted the 39 members of the two fencing teams to arrive at the figures stated in the text. These numbers do not include junior varsity participants at Brown.

men and 2683 (47.6%) women enrolled as undergraduates at Brown. Plaintiffs' Exhibit 1.

Nearly all of the men's varsity teams were established before 1927. Baseball was created first in 1869, followed by football in 1878 and track in 1879. The only men's teams established after 1927 were crew in 1961, water polo in 1974 and squash in 1989. By comparison, virtually all of the women's varsity teams were created between 1971 and 1977. The only women't varsity team created after this period was winter track in 1982. Before 1971, all women's sports were operated out of a separate athletic program at Pembroke College, a sub-unit of Brown University until its merger with Brown College during that year. Before the merger, the women's athletic program at Pembroke bore no resemblance to the program which Brown provided to its male varsity athletes. While Pembroke did have a few intercollegiate teams (e.g., field hockey, basketball, tennis), the women's program received very little financial or institutional support from the university.

In May 1991, Brown cut off university funding for, and lowered the status of, 4 of the 31 varsity teams: men's golf, men's water polo, women's gymnastics and women's volleyball. Initially, these teams were dubbed "club varsity," but they were later classified as "intercollegiate club." The parties dispute the exact number of players affected by the demotion. In a pre-trial affidavit, defendant David Roach, Brown's Athletic Director, declared that the change in status affected 58 men and 20 women. Roach Affidavit at ¶ 11. However, in a memorandum to Brown's Advisory Committee on University Planning ("ACUP") dated April 9, 1991, Mr. Roach stated that the elimination of funding would affect approximately 34 men and 22 women. Plaintiffs' Exhibit 9. Plaintiffs argue that the cut eliminated 37 men and 23 women based upon 1990-91 team sizes reported by Brown to the NCAA. According to plaintiffs' data, the post-demotion totals,

in 1991-92, were 529 men (63.4%) and 305 women (36.6%)

The decision to eliminate the four teams from varsity status was apparently made in response to a university-wide directive to cut 5% to 8% from the budget over several years, and at least 3% in the 1991-92 budget. By "unfunding" the four teams, Brown expected to realize a total savings of approximately $77,800 per year. Overall, the athletic department proposed a cut of roughly $115,500, or 2.7% of the department's total budget. Broken down by team, the $77,800 savings from the varsity cuts was apportioned as follows: (a) women's volleyball—$37,127; (b) women's gymnastics—$24,901; (c) men's water polo—$9,250; and (d) men's golf—$6,545. Plaintiffs' Exhibit 9.

After the four teams were reduced in status, they were permitted to participate in intercollegiate competition provided they raise all of their own operating funds from private sources and conform to NCAA and Ivy League rules. As the defendants note, all four teams successfully raised the necessary funds to compete in the 1991-92 and 1992-93 seasons. In addition, all four teams continue to be eligible for post-season tournament and championship events, and receive assistance from Brown in meeting Ivy League and NCAA guidelines for such participation.

Nevertheless, in addition to the elimination of university funding, the four teams lost significant privileges in the wake of the demotion. Evidence at the hearing indicates that during the 1991-92 and 1992-93 season, for example, incidents occurred during which varsity teams received priority over intercollegiate clubs in practice time and in access to medical trainers. The university also stripped the coaches of the women's teams of office space, long-distance telephone service and clerical support. Further, the four teams lost "admission preferences" in recruiting freshman. In April 1992, plaintiffs filed suit against Brown.

III. *Legal Framework*

A. *Title IX*

Title IX prohibits gender discrimination in education programs or activities receiving federal financial assistance. The statute provides in relevant part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . ." 20 U.S.C. § 1681(a).

Plaintiffs assert that Brown receives federal financial assistance, including assistance provided through financial aid. Thus, according to them, the university "is subject to the requirements of Title IX including, *inter alia*, in its intercollegiate athletic program." First Amended Complaint at ¶ 24. Brown acknowledges that it receives federal financial assistance, but at the same time does not admit or deny that its athletic program is covered by Title IX. Answer of Brown University, Vartan Gregorian and David Roach at ¶ 24.

Before 1988, it is possible that Brown's athletic program would have been outside the grasp of Title IX. In *Grove City College v. Bell*, 465 U.S. 555 (1984), the U.S. Supreme Court narrowly construed the phrases "program or activity" contained in the Title IX statute. In that case, the Court *did* hold that federal student aid monies flowing to students at Grove City College subjected the school's entire financial aid office to the dictates of Title IX. However, the Court also concluded that the "assumption that Title IX applies to programs receiving a larger share of a school's own limited resources as a result of federal assistance earmarked for use elsewhere within the institution is inconsistent with the program-specific nature of the statute." 465 U.S. at 572. Thus,

the receipt of federal financial aid by students at the college did "not trigger institutionwide coverage under Title IX." *Id.* at 573.

In an effort to overturn the *Grove City* decision, Congress passed the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988). In its findings, Congress stated that "legislative action is necessary to restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application" of four major civil rights acts: Title IX; Section 504 of the Rehabilitation Act of 1973; the Age Discrimination Act of 1975; and Title VI of the Civil Rights Act of 1964. Pub. L. No. 100-259, § 2, 102 Stat. 28. To accomplish this goal, the Civil Rights Restoration Act explicitly defined the phrase "program or activity" and "program" in Title IX and the three other civil rights statutes "to make clear that discrimination is prohibited throughout entire agencies or institutions if any part receives Federal financial assistance." S. Rep. No. 64, 100th Cong., 2d Sess. 4, *reprinted in* 1988 U.S.Code Cong. & Ad. News 6.

Section 908 of the amended Title IX now reads:

> For the purposes of this chapter, the term [sic] "program or activity" and "program" mean all of the operations of—
>
> * * * *
>
> (2)(A) a college, university, or other postsecondary institution, or a public system of higher education. . . .
>
> * * * *
>
> any part of which is extended Federal financial assistance. . .

20 U.S.C. § 1687.

Under this definition, the receipt of federal financial assistance by any segment of a school, or any student, would bind the entire school to the requirements of Title

IX. *See Radcliff v. Landau*, 883 F.2d 1481, 1483 (1989), *clarified*, 892 F.2d 51 (1989), *affirmed after remand*, 930 F.2d 29 (9th Cir. 1991) (interpreting Title VI). Given that Brown admits receiving Federal financial assistance, this Court concludes that the university as a whole, including its athletic department, is subject to Title IX.

B. *Athletics Regulation*

Under Title IX, the U.S. Department of Education has promulgated regulations governing the administration of programs that receive federal funding. One particular regulation relates to athletic programs, and is codified at 34 C.F.R. § 106.37(a) and § 106.41. The first part of this regulation addresses athletic scholarship offered for "interscholastic or intercollegiate athletics." § 106.37(c). The chief goal of this segment of the regulation is to ensure that scholarship monies are awarded in proprotion to the number of students of each sex participating in athletic programs.

The second component of the regulation is broader in scope, encompasing "any interscholastic, intercollegiate, club or intramural" athletic program offered by an institution. 34 C.F.R. § 106.41(a). This part of the regulation addresses the issue of "equal opportunity" between the sexes, the critical issue in the case at hand. The pertinent section reads in full:

> (c) *Equal Opportunity*. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:
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> (1) Whether the selection of sports and levels of competition effectivey accommodate the interests and abilities of members of both sexes;

(2) The provision of equipment and supplies;

(3) Scheduling of games and practice time;

(4) Travel and per diem allowance;

(5) Opportunity to receive coaching and academic tutoring;

(6) Assignment and compensation of coaches and tutors;

(7) Provision of locker rooms, practice and competitive facilities;

(8) Provision of medical and training facilities and services;

(9) Provision of housing and dining facilities and services;

(10) Publicity

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute non-compliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

34 C.F.R. § 106.41(c).

C. *Official Policy Interpretation*

The Office for Civil Rights of the U.S. Department of Education is charged with enforcement of Title IX. In 1979, this Office published in the Federal Register an official "Policy Interpretation" of the "intercollegiate athletic provisions" of Title IX and its implementing regulation. 44 Fed. Reg. 71413. (December 11, 1979).[8] The

[8] At the time the Policy Interpretation was published, the Office of Civil Rights was part of the Department of Health, Education, and Welfare.

eleven-page document states that its purpose is to: "clarif[y] the obligations which recipients of Federal aid have under Title IX to provide equal opportunities in athletic programs. In particular, this Policy Interpretation provides a means to assess an institution's compliance with the equal opportunity requirements of the regulation which are set forth at [34 C.F.R. § 106.37(c) and § 106.41c)]." 44 Fed. Reg. at 71415.

To help elucidate the meaning of "equal opportunity," the Policy Interpretation is divided into three sections. The first section focuses on the specific provision dealing with athletic scholarship contained in 34 C.F.R. § 106.37 (c). The second section addresses elements (2) through (9) lisited in § 106.41(c). This second section of the Policy Interpretation raises two additional criteria to be examined in athletic programs: (a) recruitment and (b) support services. The third and final section solely discusses the first element listed in § 106.41(c) pertaining to the effective accommodation of student interests and abilities.

Within each of these three areas, the Policy Interpretation provides specific questions and criteria for evaluating athletic programs. On a general note, the Policy Interpretation states that it is "designed specifically for intercollegiate athletics," but that its "general principles" are applicable to interscholastic, club and intramural athletic programs. 44 Fed. Reg. at 71413. It also declares that "club teams" under the Policy Interpretation "will not be considered to be intercollegiate teams except in those instances where they regularly participate in varsity competition." *Id.* at 71413 n.1.

D. *Athletics Investigator's Manual*

In 1990, the Office for Civil Rights published a manual to facilitate Title IX investigations of interscholastic and intercollegiate athletic programs. This document—entitled "Title IX Athletics Investigator's Manual: 1990"—pro-

vides another layer of guidance for investigators with the Office for Civil Rights in interperting the Title IX regulation. This Manual was intended to supersede two similar guidance documents issued by the Office for Civil Rights in 1980 and 1982.

For the most part, the 1990 Investigator's Manual tracks the outline of the Policy Interpretation. The Manual devotes separate sections to each of the 13 "program components" listed in the Policy Interpretation. In addition, the Manual underscores the tripartite structure of the Policy Interpretation with respect to these 13 components. As stated above, the three areas are:

(1) athletic scholarships—§ 106.37(c);

(2) the effective accommodation of athletic interests and abilities—§ 106.41(c)(1);

(3) other athletic benefits and opportunities—§ 106.41(c)(2)-(10), plus recruitment and support services.

For intercollegiate athletics, the Manual recommends to investigators that all 13 of these program components be examined during an investigation. The Manual recognizes, however, that the Policy Interpretation "permit[s] separate investigations and findings" for these "three major areas." Manual at 7. The Manual further concludes that "[a]n investigation may be limited to less than all three of these major areas where unique circumstances justify limiting a particular investigation to one or two of these major areas." *Id.*

IV. *Discussion*

In determining a motion for preliminary injunction, the district court must consider four factors:

(1) The likelihood of success on the merits;

(2) The potential for irreparable harm;

(3) A balancing of the relevant equities (most importantly, the hardship to the nonmoving party if the restrainer issues as contrasted with the hardship to the moving party if interim relief is withheld); and

(4) The effect on the public interest of a grant or denial of the restrainer.

Narragansett Indian Tribe v. Guilbert, 934 F.2d 4, 5 (1st Cir. 1991); *Aoude v. Mobil Oil Corp.,* 862 F.2d 890, 892 (1st Cir. 1988). Of these factors, the First Circuit has regarded likelihood of success as "critical." *Narragansett Indian Tribe,* 934 F.2d at 6; *Public Service Co. v. West Newbury,* 835 F.2d 380, 383 (1st Cir. 1987); *Lancor v. Lebanon Housing Authority,* 760 F.2d 361, 362 (1st Cir. 1985); *see also El Dia, Inc. v. Hernandez Colon,* 963 F.2d 488, 498 n.12 (1st Cir. 1992). I will address each component in turn.

A. *Likelihood of Success*

1. *Arguments of the Parties*

a. *Plaintiffs*

Plaintiffs allege that the Brown athletic program is in violation of Title IX. They based this claim primarily upon one factor in the "equal opportunity" provision of the Title IX athletics regulation. That factor, spelled out in § 106.41(c)(1), asks "[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes." Plaintiffs maintain that in evaluating this criteria the Court must apply a three-part test contained in the Policy Interpretation. The test asks:

(1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or

> (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
>
> (3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

44 Fed. Reg. at 71418. Plaintiffs assert that the answer to all of these questions is "no," and as a result Brown is in violation of Title IX.

As a first step, plaintiffs cite to the disparity of athletic "participation opportunities" available to women in comparison to men. Plaintiffs marshall evidence that no time since the inception of Title IX has the percentage of women participating in intercollegiate athletics at Brown been substantially equivalent to the percentage of women undergraduates. Plaintiffs' contention assumes, I note, that the number of *participants* in Brown's athletic program accurately reflects the number of participation *opportunities* offered by the university. In a nutshell, plaintiffs claim that Brown has structured its varsity program to provide no more than 39% of the varsity opportunities to women, even though women have consistently comprised approximately 48%-49% of the undergraduate population.

According to plaintiffs, Brown has systematically controlled the number of athletes through its selection of the sports it provides to men and women, the size of the teams it offers, and the quality of the coaches it employs. In addition, they allege that Brown has predetermined

the number of women athletes by limiting recruitment dollars for women's teams, as well as by restricting the percentage of admissions preferences given to prospective women varsity athletes.[4] Plaintiffs also note that the Investigator's Manual (at 24) directs investigators, for purposes of evaluating compliance with the first question in the Policy Interpretation's three-part test, to compare the number of male and female *participants* in the athletic program with the numbers of full-time undergraduate students. Hence, in support of their assumption that participation equals opportunities, plaintiffs note that the Manual does not distinguish between participation and participation opportunities.

With respect to the second question in the three-part test, plaintiffs assert that Brown halted its expansion of opportunities for women at least ten years ago without achieving equality. While they concede that Brown embarked on a program to expand opportunities for women in athletics during the 1970s, they complain that Brown has not added a single women's varsity sport since winter track in 1982.

As to the third question, plaintiffs contend that Brown is not effectively accommodating the interests and abilities of women, at least at the varsity level. In addition to gymnastics and volleyball, plaintiffs argue that there are other women athletes who have the ability to participate on varsity teams, including those students on the fencing, rugby, water polo and sailing "clubs." Plaintiffs also note that Brown specifically rejected a request by the women's fencing team (and men's team) to be elevated to varsity

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[4] Plaintiffs claim, based on data from Brown's Admission Office, that over the past ten years women have consistently comprised a much lower percentage of the total number of Brown varsity athletic recruits offered admission in relation to men. According to the data, the admissions process produced, on average, approximately 65% admissions of men and 35% admissions of women over the ten year period.

status in 1986 or 1987 and again in 1990. Thus, they conclude, even before the demotion of the four teams in May 1991, Brown failed to meet the third party of the Policy Interpretation's three-pronged test.

Although plaintiffs principally rely upon § 106.41(c)(1) to support their motion, they also assert that there is evidence of Title IX violations in other aspects of Brown's athletic program. Plaintiffs allege that there is inadequate funding for many women's teams, and that significant disparities exist between men and women's teams in the areas of coaching, equipment, publicity and recruitment.[5]

Plaintiffs cite little caselaw to support their claims. One case they do note was recently decided by a U.S. Magistrate Judge in New York. *Cook v. Colgate University*, No. 90-CV-411 (N.D.N.Y. September 23, 1992). In that case, the Magistrate Judge found Colgate University in violation of Title IX because the school had refused four student requests to elevate the women's ice hockey team from a "club" to a varsity team between 1979 and 1988. The court examined several of the ten factors in § 106.41(c) of the athletic regulation (e.g., equipment, locker room facilities, travel allowances, coaching) and scrutinized Colgate's arguments that there was a lack of student interest and ability, and a shortage of funds.

In finding a Title IX violation, the *Cook* court was particularly swayed by the gross inequalities between the women's "club" and the men's varsity ice hockey teams. The Court did not look at any other athletic teams at Colgate, nor did it examine any statistics on the total number of athletic "opportunities" in relation to the percentage of men and women enrolled at the university. The Court simply found what it considered to be inequalities in treatment with respect to the two ice hockey

[5] Because Brown does not offer athletic scholarships, no evidence was presented by plaintiffs on compliance under § 106.37(c).

teams. As a result, it ordered Colgate to grant varsity status to the women's ice hockey program starting with the 1993-94 academic year and "to provide equivalent athletic opportunities for the women's ice hockey players in accordance with the law." *Cook*, slip. op. at 33.

A second case cited by plaintiffs, *Favia v. Indiana University of Pennsylvania*, C.A. No. 92-2045 (W.D.Pa. November 2, 1992), was decided last month by a U.S. District Court judge in Pennsylvania. The facts in *Favia* are strikingly similar to the present case. In August 1991, Indiana University of Pennsylvania ("IUP") announced that the women's gymnastics and field hockey teams, and the men's soccer and tennis teams, were slated for elimination as intercollegiate varsity teams beginning with the 1992-93 season. According to IUP's Athletic Director, the cutbacks were made in response to a directive by the university to reduce their department budget. Before the 1991 cutback, IUP had 313 men (62.2%) men and 190 women (37.8%) athletes on its intercollegiate teams. Following the elimination of the four teams, there were roughly 248 men (62.5%) and 149 women (37.5%) varsity athletes. In 1990-91, IUP had 4790 men (44.4%) and 6003 women (55.6%) enrolled as undergraduates.

Women students at IUP brought a class action lawsuit under Title IX and the Fourteenth Amendment to the United States Constitution alleging systemic discrimination on the basis of sex in the university's intercollegiate athletic program. Plaintiffs sought the reinstatement of the two women's teams and an order prohibiting the university from eliminating further women's teams. In ruling in favor of the plaintiffs, the Court simply applied the three-part test contained in the Policy Interpretation to find IUP in violation of Title IX. The Court found that IUP had "failed to override the proportionality requirement" of the test by failing to show a history of expanding the number of athletic opportunities for women or demonstrating that it had fully and effectively accommo-

dated the interests and abilities of women students. *Favia*, slip. op. at 16-17. The Court ordered the immediate restoration of the two women's teams to their former status, with university backing and funding equivalent to that furnished during their last year as a varsity team.

b. *Defendants*

Brown advances two main counter arguments to plaintiffs' claims. First, Brown asserts that plaintiffs' reading of Title IX is too simplistic. From Brown's perspective, the Title IX athletic regulation, the Policy Interpretation and the Investigator's Manual contain a complex framework for assessing athletic programs *as a whole*. Thus, in their view, plaintiffs would have to address many more questions and factors before proving a Title IX violation. For example, Brown believes that in assessing "equal opportunity," the Court must not only consider § 106.41 (c)(1), but also assess the nine other factors listed in § 106.41(c).

In addition, Brown vehemently disputes plaintiffs' focus on the comparison of the ratio of men and women participating in intercollegiate athletics to their relative ratio in the undergraduate population. From Brown's vantage point, the Title IX statute itself states that it does not require a strict "proportionality" test in assessing violations of the law. In support, they quote the following language contained in 20 U.S.C. § 1681(b):

> Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total num-

> ber or percentage of persons of that sex in any community. . . [9]

Brown avers that this provision explicitly recognizes that equal opportunity does not require proportionality. Moreover, Brown contends that this section precludes preferential treatment to members of one sex on account of a disparity that may exist with respect to the other sex. In short, Brown alleges that "Title IX is not an affirmative action statute." Defendant's Post-Hearing Memorandum at 7.

Brown also believes that the plaintiff's proportionality claim is inconsistent with the athletic regulations emphasis on accommodating the interests and abilities of both sexes. They argue that it is the interests and abilities of students, not the relative proportion of the sexes, that determines what "participation opportunities" must be offered to each sex. In other words, it is *opportunity*, not *participation*, that is the crucial factor for determining compliance under the regulation. If not, they suggest, then the regulation would have simply required "equal athletic participation."

Further, Brown flatly denies plaintiffs' argument that it has "structured" its athletic program to achieve a set percentage of men and women participants. Joan Taylor, an Associate Athletic Director at Brown, testified that the roughly 60% men to 40% women ratio of varsity athletes at Brown is simply a reflection of the interests and abilities of the students. Brown concludes that "this Court has absolutely no evidence upon which it could conclude that the ratio of 'participation opportunities provided to

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[9] Section 1681(b) continues:

> . . . State, section, or other area: *Provided*, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

male and female student athletes is not *substantially* proportionate to the relative population of each sex." Defendant's Post-Hearing Memorandum at 37 (emphasis in original).

Brown's second and related argument is that it *is* effectively accommodating the interests and abilities of its students. Brown notes that its athletic program consists of a wide spectrum of sporting services, including the free use of athletic facilities, physical education classes, intramural sports, club sports and intercollegiate club sports, as well as junior varsity and varsity sports.[7] At all of these levels, Brown asserts, it does not discriminate on the basis of sex, nor does it limit the number of "opportunities" available for either men or women. Brown also boasts that it fields one of the highest number of men's and women's teams to compete at the NCAA or Ivy League level. Thus, according to the defendants, any disparities which exist between the number of men and women varsity athletes is merely a reflection of the varying interests and abilities of the students.

Finally, Brown maintains that the change in status of the four teams is "not legally significant" under Title IX. Post-Hearing Memorandum at 21. Brown notes that those teams continue to compete at an intercollegiate level and that the Policy Interpretation specifically allows "club teams" to be considered "intercollegiate teams" where they "regularly participate in varsity competition." The only change, from Brown's perspective, is a shift in funding status. Alternatively, Brown argues that even if the change of status *was* legally significant, its actions ex-

[7] The parties presented little evidence on the full scope of club or intramural programs at Brown. One reason is that club teams are student-run and the Athletic Department apparently does not maintain rosters of these teams. Still, Brown estimates that for the years 1990-91 and 1991-92, there were a total of 12 club sports, including frisbee, cricket, skiing and tae kwan doe. Most of these club teams were coed, with approximately 480 men and women participating.

panded the ratio of men to women in the varsity program because almost twice as many men were affected than women.

2. *Defining The Applicable Standard: Threshold Issues*

a. *Policy Interpretation and Investigator's Manual*

I must state at the outset of my analysis that there are no simple tests to apply in this area. I also recognize that the Policy Interpretation and the unpublished Investigator's Manual do not carry the force of law or establish controlling standards for this Court. Nevertheless, I believe the Policy Interpretation, and to a slightly lesser extent the Investigator's Manual, are important guides in unraveling the requirements of the athletic regulation. Moreover, considerable weight should be given to an agency's interpretation of its own regulation. *Martin v. Occupational Safety and Health Review Commission*, —— U.S. ——, 111 S.Ct. 1171, 1175 (1991); *Sprandel v. Secretary of Health and Human Services*, 838 F.2d 23, 25 (1st Cir. 1988); *McCuin v. Secretary of Health and Human Services*, 817 F.2d 161, 168 (1st Cir. 1987). In addition, given the paucity of caselaw in this area, both parties rely heavily upon the Policy Interpretation and the Investigator's Manual to support their respective arguments. Indeed, to a large extent, the dispute in this case revolves around differing interpretations of these documents.

b. *Can § 106.41(c)(1) Provide A Sole Basis For A Title IX Violation?*

Even accepting the Policy Interpretation as a starting point, a further threshold determination remains concerning § 106.41(c)(1). The parties dispute, and the Court must determine, the fundamental issue whether a violation of Title IX may be grounded solely upon this sole cri-

teria. The defendants insist that Title IX requires a program-wide analysis to determine compliance. The defendants' strongest support on this point derives from the Investigator's Manual.[8] The Manual states that "[i]nvestigations of athletics programs are frequently difficult and lengthy, primarily because of the considerable amounts of information that must be collected, analyzed, and evaluated to determine compliance." Manual at 2. The Manual further emphasizes that compliance with Title IX should ordinarily rest upon more than one particular aspect of an athletic program:

> There is no rule or number of disparities that when reached constitutes a violation. Generally, the determination is whether, in reviewing the program as a whole, the disparities add up to a denial of equal opportunity to athletes of one sex.

Manual at 10.

This language is not conclusive. First, as noted above, the Policy Interpretation distinguishes and discusses

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[8] For support of their program-wide argument, defendants also refer this Court to a recent decision by a U.S. District Court in New Mexico involving Title IX and athletics. *Arnot v. Ramo*, C.A. No. 92-0551 (D.N.M. July 20, 1992) (bench decision). In an oral ruling, Chief Judge Burciaga stated:

> ". . . I'm concerned that the way the plaintiffs read Title IX, that alone would preclude this Court granting a preliminary injunction.
>
> It's my view of Title IX at the present time, and I would have to be persuaded otherwise, that the program requires a program-wide analysis and not a sport-specific analysis." Transcript at 19.

It is difficult for this Court to fully evaluate the decision in *Arnot* because the facts of that case are not fully explained in the court's brief ruling. It appears, however, that the central question in that case is what Title IX obligations an institution has under § 106.41 where it sponsors a specific sport for one sex, but not for the other. This particular issue is not before this Court in the case at bar.

§ 106.41(c)(1) separately from the nine other factors contained in § 106.41(c). Second, the Policy Interpretation states that a finding of noncompliance under § 106.41 (c)(1) may be based upon "disparities of a substantial and unjustified nature . . . in the institution's program as a whole," or based upon "disparities in . . . individual segments of the program [which] are substantial enough in and of themselves to deny equality of athletic opportunity." 44 Fed. Reg. at 71417, 71418. Third, in reference to the Policy Interpretation's three-part framework, the Investigator's Manual itself states on another page that intercollegiate athletic investigations "may be limited to less than all three of these major areas where unique circumstances justify limiting a particular investigation to one or two of these major areas." Manual at 7.

There is little question that this factor is the most important criteria listed in § 106.41(c). In addition, not every institution can be evaluated under all 13 "program components." Brown, for example, does not offer athletic scholarships and thus there is no need to examine compliance under § 106.37(c). In my view, the Policy Interpretation and the Investigator's Manual suggest that Title IX determinations must be flexible to accommodate individual institutions. And both documents indicate that determinations of noncompliance may be limited to § 106.41(c)(1). For all of these reasons, I hold that a finding of violation of under Title IX may solely be limited to § 106.41(c)(1).

3. *Determining The Applicable Standard Under § 106.41(c)(1)*

The next issue to address is how in fact to determine whether an institution is complying with § 106.41(c)(1). The plaintiffs believe that the Policy Interpretation "provide[s] in pertinent part that compliance with Title IX's requirement of providing equal opportunities to participate in intercollegiate athletics will be evaluated by determining" the answers to the three-part test spelled out in

that document. Memorandum In Support of Plaintiffs' Motion For Preliminary Injunction at 6. The defendants disagree. In their view, these three questions only relate to the issue of "levels of competition" within § 106.41 (c)(1), and even on this narrow topic the three questions are not dispositive.

At first blush, the defendants have a point. The three-part test appears to be limited to the issue of "levels of competition" within the Policy Interpretation's section on § 106.41(c)(1). But on closer scrutiny, the three-part test is clearly at the heart of evaluating this factor.

For clarity, I will examine the Policy Interpretation's discussion of § 106.41(c)(1) step by step. First, the Policy Interpretation spells out three underlying factors behind § 106.41(c)(1): (a) the determination of athletic interests and abilities; (b) the selection of sports offered; and (c) the levels of competition available, including the opportunity for team competition. With respect to the first factor, the Policy Interpretation states that in determining the interests and abilities of their students, institutions should take account of several factors, including the "nationally increasing levels of women's interests and abilities" and "the expressed interests of students capable of intercollegiate competition who are members of an underrepresented sex." 44 Fed. Reg. at 71417.

Next, the Policy Interpretation's analysis touches upon the "selection of sports." It notes, for example, that "where an institution sponsors a team in a particular sport for members of one sex, it may be required either to permit the excluded sex to try out for the team or to sponsor a separate team for the previously excluded sex." 44 Fed. Reg. at 71418. The Policy Interpretation then turns to the crucial "levels of competition" subsection. The discussion begins by stating that "[i]n effectively accommodating the interests and abilities of male and female athletes, institutions must provide both the opportunity for individuals of each sex to participate in inter-

collegiate competition, and for athletes of each sex to have competitive teams schedules which equally reflect their abilities." *Id.* The Policy Interpretation then declares that compliance will be assessed under the three-part test. It also adds that compliance with this provision will also be measured by evaluating two additional questions:

> (1) Whether the competitive schedules for men's and women's teams, on a program-wide basis, afford proportionally similar numbers of male and female athletes equivalently advanced competitive opportunities; or
>
> (2) Whether the institution can demonstrate a history and continuing practice of upgrading the competitive opportunities available to the historically disadvantaged sex as warranted by developing abilities among the athletes of that sex.

Id.

Finally, the Policy Interpretation concludes its discussion of § 106.41(c)(1) by offering three "overall" tests for compliance with all of § 106.41(c), not just § 106.41 (c)(1):

> (1) Whether the policies of an institution are discriminatory in language or effect; or
>
> (2) Whether disparities of a substantial and unjustified nature in the benefits, treatment, services, or opportunities afforded male and female athletes exist in the institution's program as a whole; or
>
> (3) Whether the disparities in individual segments of the program with respect to benefits, treatment, services, or opportunities are substantial enough in and of themselves to deny equality of athletic opportunity.

Id.[9]

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[9] These three general questions also appear at the end of the Policy Interpretation's subsection addressing the nine factors in § 106.41(c)(2)-(10), plus recruitment and support services.

The Investigator's Manual provides some additional guidance in this complicated area. In its separate section on § 106.41(c)(1), the Manual specifies that there is a two-part analysis in determining effective accommodation of student interests and abilities. First, it states that an investigation should analyze "equal opportunities to compete." Second, the investigation should assess the "levels of competition." Manual at 21. With respect to the first part, the Manual spells out the Policy Interpretation's three-part test, which it remarks "may be considered consecutively to assess the opportunity for individuals" of each sex to compete. *Id.* Focusing on the second step, the Manual recites the two additional questions relating to competitive opportunities. It states that these questions "also must be considered to assess whether the quality of competition provided to male and female athletes equally reflects their abilities." *Id.* at 22.

What does all of this mean? In my opinion, the three-part test is the point of departure for evaluating compliance under § 106.41(c)(1). In addition, I believe that the two questions addressing competitive opportunities must be asked when evaluating § 106.41(c)(1). Thus, in determining compliance under § 106.41(c)(1), a court must conduct a two step analysis. First, it should apply the three-part test, and second, it should apply the two questions on competitive opportunities. A violation of § 106.41(c)(1) can occur in either one of these two steps, or in both. A court should not attempt to balance a finding of violation in one step with a finding of compliance in the other. I will now apply both steps to the facts in this case.

4. *Applying The Standard Under § 106.41(c)(1)*

a. *The Three-Part Test*

(i) *Substantial Proportionality*

Plaintiffs have demonstrated that Brown does not have a "substantially proportionate" ratio of male and female

varsity athletes to their respective undergraduate enrollments. As noted *supra* Part II, in 1991-92, following the demotion of the four teams, there were 529 men (63.4%) and 305 women (36.6%) in varsity sports. During that year, there were 2917 men (51.8%) and 2716 women (48.2%) enrolled as undergraduates. Thus, Brown fails to satisfy the first question.

(ii) *Program Expansion*

Having failed the requirements of the first question, I must look to the "escape" routes for the university under parts two and three. With respect to the "program expansion" prong, evidence has shown that Brown does not have a *continuing* practice of program expansion for women athletes, even though it can point to impressive growth in the 1970s. At least since the late 1970s, the undergraduate enrollment at Brown has hovered at roughly 51%-52% men and 48%-49% women. During this period, however, the percentage of participants in the intercollegiate athletic program has remained fairly constant at approximately 61% men and 39% female. Precise numbers were not provided for every year. But according to a 1979 Title IX study internally prepared by Brown, in 1978-79, there were 558 men (63.9%) and 315 women (36.1%) participating on varsity teams. In addition, the only women's team added since 1977 was winter track in 1982, a sport that merely involved providing indoor space to the existing women's track team.

Brown argues that equating "expansion" with increased numerical participation is overly restrictive, and that there is considerable evidence showing growth in the women's athletic program. Among other things, they allege that since the 1970s: (1) coaching for women's teams has consistently improved; (2) more coaches have been added for women's teams; (3) "admissions practices" have helped women gain participation opportunities to a greater degree than men; and (4) the level of competition for women has increased. Defendants' Post-Hearing Memorandum at 42-43.

Even accepting all of the above statements as true, I still believe that Brown has failed to satisfy the second question in the three-part test. The Policy Interpretation directly links the "program expansion" step to the number of teams and athletes participating in intercollegiate competition, regardless of whether the quality of the program has improved. Thus, I believe, that in assessing compliance with this question, a court must address past actions and future plans to add or eliminate sports, taking into consideration the interests and abilities of the underrepresented sex. This interpretation is consistent with the Investigator's Manual (at 24-25).

(iii) *Interests and Abilities*

Brown has failed questions one and two under the three-part test. I now move on to the last question. With all due respect to defendants' position, I find that in denying ~~full~~ *varsity* status to the women's volleyball and gymnastics teams, Brown has not accommodated the interests and abilities of women athletes under the existing athletic program. Keeping the two teams at an "intercollegiate club" level is not sufficient to satisfy the third question of the three-part test. If Brown could establish that despite the statistical disparity between the number of men and women participating on varsity teams, there are no other women who want to compete at this level, the university might have a strong defense. Brown might have demonstrated, for example, that it attempted to create new varsity teams, but that there was no interest or ability to play these sports. Or, it might have shown that women have not asked Brown to establish any new varsity teams.

But that is not the case here. Brown is cutting off varsity opportunities where there is great interest and talent, *and* where Brown still has an imbalance between men and women varsity athletes in relation to their undergraduate enrollments. Both the women's gymnastics and volleyball teams have competed as varsity intercollegiate teams since 1974. More importantly, testimony at the

hearing showed that these two teams were viable varsity squads when they were demoted in May 1991. The women's gymnastics team, for example, won the Ivy League championship in 1990. That same year, Eileen Rocchio, one of the plaintiffs, was the individual "all-around" Ivy League gymnastics champion, and was named rookie of the year in the East Coast Athletic Conference. Many of the individual plaintiffs who testified described in detail their dedication to sports and their years of training prior to matriculating at Brown.

Further, some evidence was suggested that other women's teams besides gymnastics and volleyball have been, and continue to be, qualified to compete at the varsity level. At this preliminary stage, I am not in a position to rule definitively on the varsity capabilities of other teams. Nor do I believe that Brown's violation of the three-part test requires it to simply create new women's varsity teams at the request of any students. Rather, Brown may consider the expressed interests of the students, whether there are sufficient numbers of athletes to form a team, and whether there is a reasonable expectation of intercollegiate competition for that team. At the same time, however, as long as men continue to constitute a disproportionate piece of the varsity pie, Brown bears the burden of proof with respect to the second and third components of the three-part test. *See Favia*, slip op. at 15. In my opinion, plaintiffs have shown a sufficient likelihood of success with respect to all three questions.

My finding here rests, in part, upon the premise that intercollegiate club status is not equivalent to varsity status. To be sure, the Policy Interpretation indicates that club teams may be considered intercollegate teams "where they regularly participate in varsity competition." 44 Fed. Reg. at 71413 n.1. But there is evidence that the gymnastics and volleyball teams are struggling not only to remain active in varsity-level competition at Brown, but

also to survive as a team at all. While the two women's teams have raised enough money to engage in intercollegiate competition in the 1991-92 and 1992-93 seasons, the total amount was much less than the modest sums they received as varsity teams.[10] As things now stand, it is unlikely that the gymnastics team will have enough money to employ a head coach after Jacqueline Court's contract with Brown expires in June 1993.

John Parry, Brown's Athletic Director from 1979 to 1990, testified that these two teams have perhaps two years of continued life from the date they lost varsity status. Without admissions preferences, a recruiting budget and varsity status, he believes new team members will not likely have the talent or ability to compete at the level of the former recruited varsity players. Thus, according to Parry, the teams will eventually lose their ability to compete and will cease to exist. Some tangible impacts can already be seen. For example, there are substantial more "walk-ons"—or non-recruited players—on the gymnastics team following the graduation of seniors in Spring 1992. In volleyball, Dorothy Hert, the women's head coach, testified that no freshman joined the team for the past 1992 season to replace graduating seniors; the team is currently down to 11 members and next fall the team will have only five returning varsity members. On the scheduling front, the volleyball team also suffered some adverse consequences in 1991-92 and 1992-93. When an announcement was made that the four sports would no longer receive university funding, Northeastern University and Army called Brown to inform them that they no longer wanted to include the school on their schedule. Plaintiffs' Exhibit 17.

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[10] Volleyball operated on $41,500 in university funds and $2789 in gift funds in 1990-91. In 1991-92, volleyball subsisted on approximately $21,000. In 1990-91, gymnastics had approximately $14,000, plus its head coach's salary of $10,500. In 1992-93, gymnastics operated on roughly $6600, plus the coach's salary.

Current Brown athletic officials have acknowledged that intercollegiate club status is a clear step down for these teams. Robert Clausen, an Associate Athletic Director, conceded that Brown could have kept the women's teams at the varsity level and simply taken away their funding.[11] Jeffrey Ward, another Associate Athletic Director, testified that by changing the status of the two women's squads, Brown was altering the focus of the kind of future students it expected to attract to those teams. He also stated that athletes at the varsity level are more skilled and the level of competition is generally more intense. Finally, David Roach admitted that varsity and intercollegiate club represent separate levels of athletic competition, with varsity at the top. He confirmed that varsity status involves a level of commitment by Brown to a team that the university will support the teams and ensure their continued existence. Indeed, Mr. Roach was so concerned about these differing classifications, that he wrote a memo in December 1991 directing coaches of the four demoted teams (plus the fencing teams) to discontinue the use of the team "club varsity" to avoid leaving "high school seniors with a false impression concerning the present status or future status of these sports." Plaintiffs' Exhibit 8. The bottom line is that Brown knows full well that the two women's teams will not be able to effectively compete at an intercollegiate level without varsity status, recruitment assistance, and some type of guaranteed funding arrangement by the university.

Of course, Brown should be free to downscale its varsity program, or even abolish the program altogether. As the defendants note, the Investigator's Manual states that "Title IX does not require institutions to offer athletics programs nor, if any athletics program is offered, is there any requirement that the program be particularly good . . ." Manual at 10. But if Brown insists on operating its

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[11] This non-funded varsity status currently exists for the men's squash team.

present varsity scheme, it must increase the number of women varsity athletes or demonstrate that there are not sufficient numbers of women interested or qualified to compete at the varsity level, regardless of whether the university provides intercollegiate club, club, intramural or recreational outlets. It is only marginally significant that Brown demoted two men's varsity teams along with the women's teams. Men still occupy a greater percentage of varsity slots than women in relation to their undergraduate populations. And under the three-part test, the university has a continuing burden to justify its lack of statistical parity as long as that imbalance exists.[12]

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[12] In support of their argument that Title IX does not require strict proportionality, defendants bring to the Court's attention two Letters of Findings issued by the Office of Civil Rights (OCR) which found compliance under § 106.41(c)(1) where proportional participation was not present at a university.

In my view, neither of these two letters provide much support for their position. The first letter was issued on July 10, 1989, to the University of Nebraska at Lincoln (UNL). Overall, OCR determined that UNL was *not* in compliance with § 106.41(c). However, OCR did find that the university satisfied § 106.41(c)(1) through the *application of the three-part test spelled out in the Policy Interpretation.* While OCR found that the percentage of women participating in intercollegiate athletics at UNL was proportionate to their enrollment, it also found that: (a) there had been no decrease in the number of opportunities for women to participate in intercollegiate athletics over the previous 8 years; (b) there were no future plans to decrease the number of opportunities for women to compete; and (c) there had been no requests by female students to create additional teams.

In the second letter, sent to the University of Arkansas on September 1, 1989, OCR also found pursuant to the three-part test, that the university complied with § 106.41(c)(1) even though the participation opportunities for male and female athletes were not substantially proportionate to their undergraduate enrollments. But in this case, OCR concluded that "the number of participation opportunities for women has increased since 1974, while the number for men has decreased." In addition, OCR found that there had been "no petitions by students to offer other sports."

b. *Competitive Opportunities: Two Additional Questions*

I now turn to the two questions contained in the Policy Interpretation focusing on competitive opportunities. Little data was presented comparing the competitive schedules of the men's and women's teams. It appears that, historically, women's teams were limited in the number and geographical scope, as well as in the competitive level, of intercollegiate contests in relation to men's teams. In recent years, however, many of these inequalities have dissipated. For example, virtually all varsity teams compete at the NCAA Division I and Ivy League level. Still, Arlene Groton, an Associate Athletic Director and Professor of Physical Education at Brown, testified that while more women's teams have been able to participate in competitions outside of New England, it has not been with the same frequency or distance available to men's teams. Plaintiffs also argue that the quality of competition of the two demoted women's team is now threatened.

My tentative view is that, "program-wide," the competitive schedules at Brown provide men and women with "equivalently advanced competitive opportunities." Thus, Brown appears to satisfy the first question. Even if not completely accurate, I believe Brown has shown "a history and continuing practice of upgrading" the level of competition for women's teams under the second question. This finding does not mean that Brown's program in any way satisfies questions two and three of the three-part test, only that the competitive opportunities in that program are proportionate to the number of men and women athletes *currently* participating. Thus, despite this preliminary ruling on competitive opportunities, I find that plaintiffs have shown a likelihood of success with respect to § 106.41(c)(1) based on Brown's likely violation of the three-part test.

5. *Other Factors Contained In § 106.41(c) And The Policy Interpretation.*

I have just held that: (1) the failure to satisfy the requirements of § 106.41(c)(1), standing alone, is sufficient to support a Title IX violation; and (2) the plaintiffs are substantially likely to prevail on their claim under § 106.41(c)(1). Although not necessary to this opinion. I will also evaluate evidence presented relating to potential violations in the other factors listed in § 106.41(c) and contained in the Policy Interpretation. I believe plaintiffs have presented some compelling facts on the differences in treatment between men's and women's teams. In particular, evidence indicates substantial inequalities between the sexes in the areas of funding, publicity and recruitment. I have documented the most significant evidence presented on several of these additional elements.

a. *Funding*

Neither Title IX nor the athletic regulation require institutions to expend equal amounts of money on members of each sex. The defendants make much of this fact. However, the regulation does state that the Education Department "may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.' § 106.41(c). Further, the Policy Interpretation indicates that compliance with the regulation can hinge at least in part upon "[w]hether disparities of a substantial and unjustified nature exist in the *benefits, treatment, services,* or opportunities afforded male and female athletes . . ." 44 Fed. Reg. at 71417 (emphasis added). Thus, an examination of funding is appropriate under § 106.41(c).

Funding for athletics at Brown derives from two major sources. The first is general revenues allocated by the university to the athletic department each year. The second source is monies raised by the Brown University Sports Foundation, an entity created in 1982 to raise

funds for sports at Brown. Sports Foundation dollars are distributed through the departments regular budget process, but are separately classified as "gift accounts." [13]

In 1990-91, the total operating budget for the Brown athletic department was $7,623,131. Of this total, $5,788,898 was appropriated by the university. The Sports Foundation kicked in another $1,140,860, and the remainder came from other miscellaneous sources. Overall in 1990-91, $4,740,268 was spent on varsity sports. Men's football received the single largest chunk of the varsity money—nearly $1,280,659. Men's ice hockey and men's basketball pocketed the next largest amounts with $354,725 and $335,048, respectively. No further breakdown on the exact amounts of money spent on each men's and women's varsity teams is available from the record. However, limited data can be gleaned from the 1991 Gender Equity Study prepared by Brown for the NCAA, covering the year 1990-91. According to the Study, the total operating expenses for men's sports was $726,378 (71.2%). For women's sports, this figure was $293,798 (28.8%).[14]

With respect to recruiting efforts for varsity sports, the Study indicates that $81,532 (78.2%) was spent for men's teams while $22,737 (21.8%) was spent on women's teams.[15] Not surprisingly, men's football and ice

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[13] Smaller amounts of money are also raised by the Athletic Department through ticket sales, concessions and other activities.

[14] It appears that these figures do not represent the total operating budgets of the men's and women's programs. Rather, they are only those expenses connected with NCAA sporting contests such as lodging, meals, transportation, officials, uniforms, and equipment expenses.

The actual figures on operating expenses in the Study are $766,228 for men's teams and $333,648 for women's teams. However, the sum of $79,700 was doublecounted for track. Thus, I have divided this amount in half and adjusted the totals.

[15] Again, Brown doublecounted the amount of money it spent for track. Thus, I have divided the sum of $4500 in half and adjusted the totals.

hockey topped the list in recruitment dollars by a wide margin. Men's sports also received more money for coaches' salaries during 1990-91. The Study states that $932,227 (72.1%) was expended for head and assistant coaches for the 15 men's varsity teams during that year. On the women's side, $360,862 (27.9%) was allocated for head and assistant coaches for 14 teams.[16]

Plaintiffs claim that the amounts listed for recruiting in the Gender Equity Study do not include significant funds available to men's teams through their gift accounts. Plaintiffs also allege more generally that gift account funds disproportionately favor men's sports and exacerbate the university funding disparities between the men's and women's programs. One reason for the lopsided gift account ledgers is apparently due to the greater difficulty in raising funds for women's sports. According to an internal Brown report issued in January 1990, for example, 65% of all donations to the Sports Foundation were restricted to three men's teams: football, basketball and ice hockey. Defendants deny that the Sports Foundation favors men's teams over women's teams.

Without turning this discussion into a financial spreadsheet analysis, I want to specifically address the issue of

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[16] Brown reported $559,636 for men's head coaches and $487,074 for assistant coaches for men's teams. I subtract $5,600 for fencing and divide the squash coach's salary of $25,000 (shared with women's squash) and the head/assistant track coaches salaries of $111,642 (shared with women's track) in half, subtract $40,562 doublecounted for both men's track and men's cross-country, and adjust the results to a total of $932,227 for men's teams (72.1%).

Brown reported $351,138 for women's head coaches and $190,170 for assistant coaches for women's teams. I omit the doublecounting of the same head coach (subtract $39,831) and the same assistant coaches (subtract $32,294) for women's field hockey and women's lacrosse and for the same head coach for women's soccer and women's softball (subtract $52,500) and divide the head/assistant track coaches salaries of $11,642 in half (shared with men's track), and adjust the results to a total of $360,862 for women's teams (27.9%), with a total of $1,293,089 for coaching salaries.

gift account monies from the Sports Foundation. Brown has adopted somewhat contradictory positions with respect to these funds. On the one hand, Brown argues that their hands are often tied in spending Sports Foundation monies because it "is an entirely separate corporation—Brown does not control its restricted contributions, which can only be used for the sports designated by the donor." Defendants' Post-Hearing Memorandum at 58. The apparent reasoning behind this arrangement is that many donors do not want to "subsidize" teams, but rather seek to "enhance" funding for specific teams (e.g., a special recruiting fund for the football team).

On the other hand, the Athletic Department considers both university funding and Sports Foundation dollars as part of its overall budget. According to Brown's 1992-93 Athletic Department Policy Manual, total budgets for each team are "basically the sum" of university funds and gift accounts. Plaintiffs' Exhibit 22 at 14. The Manual also states that all of these "monies belong to the University." *Id.* It is presumably from this frame of reference that Brown officials have exercised considerable discretion over how gift accounts monies are allocated despite the wishes of specific donors. For example, David Roach prohibited the parents of some volleyball team members from paying Dorothy Hert a salary of $18,000 through the Sports Foundation even though the parents agreed to contribute or raise the necessary funds.

In my view, all monies spent by Brown's Athletic Department, whether originating from university coffers or from the Sports Foundation, must be evaluated as a whole under § 106.41(c). Thus, Title IX covers all Sports Foundation funds allocated to Brown athletics. This position is consistent with the Investigator's Manual, which warns that where "booster clubs" or other fund-raising organizations help only members of one sex, the university must balance out these differences. The Manual states:

> . . . institutions must ensure that equivalent benefits and services are provided to members of both sexes. Therefore, where booster clubs provide benefits or services that assist only teams of one sex, the institution shall ensure that teams of the other sex receive equivalent benefits and services. If booster clubs provide benefits and services to athletes of one sex that are greater than what the institution is capable of providing to athletes of the other sex, then the institution shall take action to ensure that benefits and services are equivalent for both sexes.

Manual at 5. Although I have just held that Sports Foundation monies spent on Brown athletics are within the ambit of Title IX, I am not in a position at this juncture to determine exactly where, if at all, Brown's allocation of Sports Foundation monies has created legally significant inequities with respect to benefits and services, or where such allocations are infringing upon the equal opportunities of one sex. However, this is an issue I intend to address when this case proceeds on the merits.

b. *Equipment and Supplies*

The athletic regulation specifically lists "equipment and supplies" as a factor to consider in determining compliance with Title IX. § 106.41(c)(2). Plaintiffs presented only scattered evidence on this criteria. For example, Arlene Groton testified that in the past the field hockey team did not have enough uniforms to outfit substitutes and that team members had to undress on the field. She also testified that it was her impression that members of the men's ice hockey team are provided new uniforms every one or two years, while the women's ice hockey team gets uniforms every four or five years. There was also testimony that since the gymnastics team lost varsity status, it has not had enough money to provide leotards for each competitor.

c. *Coaching*

The issue of coaching is listed in § 106.41(c)(5). Most of the evidence offered by plaintiffs on this factor related to historical inequalities. At the present time, plaintiffs claim that most of the remaining problems are concentrated at the assistant coach level. For example, the men's basketball team has two full-time assistants, while the women's team has only one full-time assistant and one part-time assistant. Similar assistant coaching disparities apparently exist between the men's and women's lacrosse, ice hockey and crew teams. In addition, as noted above, there is a wide gap in the levels of compensation paid to coaches of women's teams in relation to men's teams.

d. *Facilities*

Section 106.41(c)(7) focuses on "locker rooms, practice and competitive facilities." Again, most of the evidence presented on this factor was historical. Perhaps the most glaring problem that still exists is the ice hockey locker room facilities at Meehan Auditorium. One women's varsity ice hockey player explained at the hearing that the women's ice hockey locker room is significantly smaller than and inferior to the men's locker room.

e. *Publicity*

Publicity is listed as a factor in § 106.41(c)(10). There is strong evidence of inequalities in this area. The chief reason is that Brown's Sports Information Office, which provides media and publicity support for teams, devotes the bulk of its attention on men's football, basketball and ice hockey. Joan Taylor testified, for example, that she believed the Sports Information Office routinely assigns representatives to cover both home and away games of men's football, basketball and ice hockey. On

the women's side, Ms. Taylor could only think of women's basketball as receiving comparable coverage. Intercollegiate clubs do not receive any such Sports Information support.

f. *Recruitment*

Recruitment is not listed under § 106.41(c), but is considered a target area in the Policy Interpretation. As noted above, data show that in 1990-91 men's teams received more than three times the amount of recruiting dollars, than women's teams. In total, Brown spent $81,532 on men's teams and $22,737 on women's teams.[17] The two biggest beneficiaries were men's football and ice hockey.

Robert Clausen also testified that men's teams have more cars available to their coaches than women's teams for recruiting. As of the summer of 1990, no women's team had a car available. In contrast, football had six cars, men's basketball had three cars, and men's ice hockey and lacrosse each had one car. Since that time, women's basketball has been provided a car.

While inconclusive at this stage of the proceeding, plaintiffs have presented evidence showing possible violations of other elements of Title IX. After further discovery, plaintiffs may be able to prove such infractions. For the moment, however, I decline to rule on these issues. Having determined that plaintiffs are likely to succeed on the merits, I now turn to the remaining components for determining whether to grant injunctive relief.

B. *Irreparable Harm*

I see no need to belabor the issue of irreparable harm. Plaintiffs have demonstrated a strong likelihood of irrep-

[17] Again, plaintiffs claim that these figures do not include substantial amounts of recruiting monies available to men's teams from gift accounts.

arable harm in three major areas. The first is recruitment In the absence of injunctive relief, women's gymnastics and volleyball will be unable to attract varsity-caliber athletes to Brown. Both Jacqueline Court and Dorothy Hert testified that they have had a difficult time recruiting qualified students to Brown since the change in status. Both coaches also remarked that even a temporary order by this Court restoring their varsity status would help their efforts to attract freshman recruits. They also testified that over 50 high school seniors have expressed interest to each of them in attending Brown and participating at the varsity level. With restored varsity status, Hert explained, the volleyball team would have the necessary admissions preferences to allow her targeted recruits to be admitted to Brown, even if they had lesser academic credentials than the average incoming freshman. Hert also testified that the Admissions Office did not admit any of the volleyball candidates she submitted to them last year. While the formal application deadline for next year is January 1, 1993, a document written by the Admissions Office entitled, "Coach's Handbook, Admission Procedures, Class of 1997," and dated August 15, 1992, states that applications for varsity athletic recruits will be accepted as late as March 5, 1993. Plaintiffs Exhibit 27 at 5, 10. Thus, immediate injunctive relief would allow these teams to recruit effectively for the 1993-94 seasons.

The second area of irreparable harm is the "competitive" posture of the two women's teams. As discussed in length above, there is little question that the women's teams will be unable to maintain the same level of intercollegiate competition in their demoted capacity as they did when they were varsity sports. Again, part of the problem stems from the inability to recruit new team members that will have the talent or ability to compete at the level of the former recruited varsity players. Already there are substantially more "walk-ons" on both

teams. In addition, both teams have seen cut-backs in their competitive opportunities. As noted, Northwestern University and Army informed Brown shortly after the change in status that they no longer wanted to compete against the volleyball team. Plaintiff Eileen Rocchio was unable to compete in the NCAA regionals due to budgtery constraints. And David Roach, perhaps signifying the Athletic Department's lowered expectations for intercollegiate club sports, refused to allow the volleyball team to host the fall 1992 Ivy League championship.

The third area of harm relates to coaching staff. In the absence of preliminary relief, gymnastics probably will not have enough money to employ a new head coach after Ms. Court's contract expires in June 1993. Based on past fundraising efforts, it appears unlikely that the team will be able to raise at least $10,000 more than it has in the past in order to pay a head coach's salary. Without a coach, there is little chance the gymnastics team will be a viable intercollegiate competitor.[18]

Defendants advance several arguments why plaintiffs have not demonstrated irreparable harm. All are without merit. They first argue that plaintiffs cannot demonstrate irreparable harm because there is no legally significant difference between intercollegiate club teams and varsity teams. I have already explained in detail why I believe intercollegiate club status is not equivalent to varsity status under the existing Brown program. Thus, I reject this argument outright.

Another argument put forward by defendants is that the two women's teams can still actively recruit new members. They note, for example, that at least two of the plaintiffs decided to attend Brown *after* they learned that gym-

[18] I should note that neither of the two demote l men's teams—water polo and golf—are currently in danger of losing their head coaches. At the hearing, testimony revealed that both coaches have paid positions in other areas of the Brown Athletic Department.

nastics and volleyball were "unfunded." Further, defendants argue that many students will come to Brown whether they are recruited or not because of its reputation for academic excellence. The problem with defendants' argument is that it rests upon the assumption that any team, whether it compete at a superior level or a low level, satisfies the requirements of Title IX. As stated repeatedly throughout this opinion, however, § 106.41(c)(1) requires institutions to "effectively accommodate the interests and abilities" of its students. In addition, § 106.41 (c)(1) specifically addresses the issue of "levels of competition." In short, not all intercollegiate teams are the same.

Defendants also refute plaintiffs' claim that there are admission preferences available to varsity teams. David Roach testified that Brown does not guarantee admission of a particular number of people for any varsity sport. Rather, in his words, "[t]here's a range or a pattern or a number but it is only relative to the academic credentials of the people who apply." He added that the "admissions process" between the athletic department and the Admissions office "allows the coach to have a better understanding of what the . . . chances are of someone being accepted and to not waste their time recruiting someone who's not going to be accepted." Transcript, November 12, 1992, at 88.

Despite these disavowals, there was ample evidence presented that recruitment or admissions preferences exist at Brown, even if the exact number of slots for each team are not carved in stone. For example, in a memo dated December 11, 1990 to Ed Reed, the men's swimming and water polo coach, David Roach wrote regarding the "Number of Acceptances from Admissions":

> Ed, to further clarify your number of acceptances for this year. Your minimum numbers are 20 for

> swimming and 4 for water polo. These numbers are the least that you would receive.
>
> I hope this better defines the numbers for you.

Plaintiffs' Exhibit 25. In addition, as indicated above, Brown publishes a "Coach's Handbook" on "admission procedures." Among other things, the Handbook for the Class of 1997 lists the Admission's Office "liaison" for each varsity team. Women's volleyball and gymnastics are not included on the current list, although these teams were assigned liaisons in the Class of 1994 Handbook. The 1997 Handbook also lays out key dates for presenting names of potential recruits and provides forms for ranking top choices that must be submitted to the Admissions Office.[19]

Lastly, defendants assert that Title IX does not recognize individual harm. They quote from the Policy Interpretation, which states: "If women athletes, as a class, are receiving opportunities and benefits equal to those of male athletes, individuals within the class should be protected thereby." 44 Fed. Reg. 71421. But women athletes are *not* receiving opportunities and benefits equal to their male counterparts. I have held that Brown is not effectively accommodating the interests and abilities of the two women's teams under § 106.41(c)(1). Thus, in my view, there is class-wide injury to women athletes at Brown under this provision.

This brings me to an important point about the nature of the relief I am granting. I am sensitive to defendants' concerns about requiring specific teams to be funded as varsity. And I have no desire to micromange Brown's athletic program. Under § 106.41(c)(1), Brown has wide latitude in structuring its intercollegiate athletic program. Brown may choose, for example, to drastically

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[19] John Parry testified that when he was Brown's Athletic Director in 1983, he was told by the Director of Admissions that 90% of the athletes who were accepted by Brown would not have been admitted if they weren't on a coach's admissions preference list.

reduce the number of intercollegiate teams it sponsors. Or it may decide to eliminate the varsity program altogether. Brown may not, however, operate an intercollegiate program that disproportionately provides greater participation opportunities to one sex in relation to undergraduate enrollments, where there is no evidence of continuing program expansion or effective accommodation of the interests and abilities of its students. And that is exactly what plaintiffs have shown a likelihood of success of proving in this case.

Defendants argue that the purpose of a preliminary injunction is to preserve the status quo until a trial on merits can be held. The First Circuit has defined the status quo as the " 'last uncontested status which preceded the pending controversy.' " *Crowley v. Local No. 82, Furniture & Piano Moving, Furniture Store Drivers, Helpers, Warehousemen, and Packers*, 679 F.2d 978, 995 (1st Cir. 1982), *rev'd on other grounds*, 467 U.S. 526 (1984) (quoting *Westinghouse Electric Corp. v. Free Sewing Machine Co.*, 256 F.2d 806, 808 (7th Cir. 1958)). In the case at hand, the status quo existed in May 1991, immediately before the change in status of the four teams. Many of the named plaintiffs protested the change in status from the moment David Roach made the announcement, and continued to resist the demotion until this lawsuit was filed. Moreover, even if the current configuration of teams were considered the status quo, restoring women's gymnastics and volleyball to full varsity status through a preliminary injunction is the only effective tool available to this Court to prevent irreparable harm. *Crowley*, 679 F.2d at 995-996; *see also Ferry-Morse Seed Co. v. Food Corn, Inc.*, 729 F.2d 589, 593 (8th Cir. 1984) (". . . where the status quo is a condition not of rest, but of action, and the condition of rest . . . will cause irreparable harm, a mandatory preliminary injunction is proper").[20] For the same reason, I must also

[20] Defendants also assert that a "mandatory" preliminary injunction should only be granted in exceptional circumstances. Judge

preliminarily enjoin Brown from reducing the status or funding of any other women's varsity team until this case is resolved on the merits. If I should rule in plaintiffs' favor on the merits, I would *then* allow Brown the opportunity to present its own plan to the Court on how it intends to comply with the requirements of § 106.41 (c)(1).[21]

C. *Balancing of Relevant Equities*

Brown argues that the granting of a preliminary injunction would be a significant hardship on the university. I disagree. Brown's primary argument is that the injunction would interfere with the university's budgeting process.

Breyer addressed this argument in *United Steelworkers of America v. Textron, Inc.*, 836 F.2d 6, 10 (1st Cir. 1987), stating that "the relevant First Circuit authority does no more than suggest that courts disfavor injunctions that disturb, rather than preserve, the status quo. And this fact, in turn suggests that we should view [such an injunction] not as mandatory, but as prohibitory" (citations omitted).

I also note that the First Circuit has recognized that " '[d]istrict courts have broad discretion to evaluate the irreparability of the alleged harm and to make determinations regarding the propriety of injunctive relief.' " *K-Mart Corp. v. Oriental Plaza*, 875 F.2d 907, 915 (1st Cir. 1989) (quoting *Wagner v. Taylor*, 836 F.2d 566, 575-76 (D.C.Cir. 1987)).

[21] On a general note, I would like to add that I was rather surprised at Brown's apparent indifference towards Title IX. Both David Roach and Robert Clausen, top decisionmakers in the Athletic Department, testified that while they were cognizant of Title IX, they did not review the statute or the athletic regulation in reaching their decision to reduce the status of the four teams. Mr. Roach and Mr. Clausen also stated that they had not heard of the Official Policy Interpretation, nor did they conduct any studies to assess Brown's compliance with Title IX. In making the cuts, Mr. Clausen also testified that the Department had no intent to structure the number of varsity opportunities to reflect the percentage of men and women undergraduates, but rather only to downsize the program in proportion to the existing varsity athletes. From the evidence presented, it also appears that Brown has not conducted any Title IX studies since 1979.

Their key witness on this point was Brown's Financial Vice-President, Dr. Donald Reaves. In response to a question from the Court, Dr. Reaves testified that complying with a court order to fund the gymnastics and volleyball teams would, in his view, result "in the loss of control over decisions that need to be made at the university." Transcript of November 12, 1992, at 17.

I fully appreciate Brown's position and understand that it faces painful budgetary decisions. However, the amount of money required to restore these two teams is minuscule in relation to Brown's overall budget. Cutting these two teams saved the university roughly $62,000 per year. Dr. Reaves testified that Brown annually sets aside 1% of its operating budget for unanticipated expenses in the President's "contingency fund." At the present time, this fund has approximately $1.5 million in uncommitted monies. Robert Clausen also indicated that the Athletic Department has other sources of unrestricted and unbudgeted revenues. For example, the department receives unrestricted gift monies from the Sports Foundation each year. In 1990-91, the Department spent roughly $50,000 out of that account, with an additional $37,000 left over. In 1991-92, $77,500 was taken out of that account and a total of $139,000 was available that year.

In sum, I do not believe the temporary funding of these two women's teams would be an undue burden on Brown University.

D. *Public Interest*

Brown has likely violated Title IX by not providing women with equal opportunities in the operation of its intercollegiate program. In my view, the public interest will be served by vindicating a legal interest that Congress has determined to be an important one. Moreover, I do not believe the requested injunctive relief would have a detrimental effect on the public interest.

V. *Conclusion*

For all the reasons stated above, Brown University is ordered to take the following actions immediately:

1. Restore women's gymnastics and women's volleyball to their former status as fully funded intercollegiate varsity teams in Brown's intercollegiate athletic program;

2. Provide coaching staff, uniforms, equipment, facilities, publicity, travel opportunities and all other incidentals of an intercollegiate varsity team at Brown to women's gymnastics and women's volleyball on a basis to that provided to these teams during the 1990-91 school year;

3. Provide university funding to the two women's teams in an amount equal to that provided to the teams during the 1990-91 school year;

4. Provide an on-campus office, long-distance telephone and clerical support for the head coaches of the two teams, assign admissions liaisons, restore special admissions consideration to athletic recruits identified by the head coaches, and extend the deadline for filing applications to Brown for such recruits to the same date as the latest accorded to any recruits identified by other intercollegiate varsity teams for 1992-93, or by March 5, 1993, whichever is later; and

5. Prohibit the elimination or reduction in status, or the reduction in the current level of university funding, of any existing women's intercollegiate varsity team until this case is resolved on the merits.

Let me reiterate that I view the restoration of the two women's teams to full varsity status as a temporary solution. If I find at a trial on the merits that Brown has violated Title IX with respect to § 106.41(c)(1), I will leave it to Brown to draw up its own plan for complying with this provision. In short, Brown has the ultimate discretion in how it chooses to structure its intercollegiate athletic

program, if it decides to operate one at all, so long as it satisfies the dictates of Title IX.

So ORDERED:

/s/ Raymond J. Pettine
RAYMOND J. PETTINE
Senior U.S. District Judge

December 22, 1992

Entered as an Order of this Court on December 22, 1992.

/s/ Illegible

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS, AND AGENCY INTERPRETATION

UNITED STATES CONSTITUTION, AMENDMENT V

ARTICLE [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

20 U.S.C. § 1681(a) (1994)

§ 1681. Sex

(a) Prohibition against discrimination; exceptions

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

(1) Classes of educational institutions subject to prohibition

in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

(2) Educational institutions commencing planned change in admissions

in regard to admissions to educational institutions, this section shall not apply (A) for one year from June 23, 1972, nor for six years after June 23, 1972, in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education, whichever is the later;

(3) Educational institutions of religious organizations with contrary religious tenets

this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

(4) Educational institutions training individuals for military services or merchant marine

this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;

(5) Public educational institutions with traditional and continuing admissions policy

in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex;

(6) Social fraternities or sororities; voluntary youth service organizations

this section shall not apply to membership practices—

(A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of title 26, the active membership of which consists primarily of students in attendance at an institution of higher education, or

(B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are

so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age;

(7) Boy or Girl conferences

this section shall not apply to—

(A) any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(B) any program or activity of any secondary school or educational institution specifically for—

(i) the promotion of any Boys State conference, Boys Nation conference, Girls Nation conference; or

(ii) the selection of students to attend any such conference;

(8) Father-son or mother-daughter activities at educational institutions

this section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex; and

(9) Institution of higher education scholarship awards in "beauty" pageants

this section shall not apply with respect to any scholarship or other financial assistance awarded by any individual because such individual has received such award in any pageant in which the attainment of such award is based upon a combination of factors

related to the personal appearance, poise, and talent of such individual and in which participation is limited to individuals of one sex only, so long as such pageant is in compliance with other nondiscrimination provisions of Federal law.

20 U.S.C. § 1681(b) (1994)

(b) Preferential or disparate treatment because of imbalance in participation or receipt of Federal benefits; statistical evidence or imbalance

Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: *Provided,* That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

20 U.S.C. § 1681 note (1994)

REGULATIONS; NATURE OF PARTICULAR SPORTS: INTERCOLLEGIATE ATHLETIC ACTIVITIES

Pub. L. 93-380, title VIII, § 844, Aug. 21, 1974, 88 Stat. 612, directed Secretary to prepare and publish, not more than 30 days after Aug. 21, 1974, proposed regulations implementing the provisions of this chapter regarding prohibition of sex discrimination in federally assisted programs, including reasonable regulations for intercollegi-

ate athletic activities considering the nature of the particular sports.

20 U.S.C. § 1682 (1994)

§ 1682. Federal administrative enforcement; report to Congressional committees

Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to

comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

(Pub. L. 92-318, title IX, § 902, June 23, 1972, 86 Stat. 374.)

42 U.S.C. § 2000d (1994)

§ 2000d. Prohibition against exclusion from participation in, denial of benefits of, and discrimination under federally assisted programs on ground of race, color, or national origin

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

(Pub. L. 88-352, title VI, § 601, July 2, 1964, 78 Stat. 252.)

42 U.S.C. § 2000e-2(a) (1994)

§ 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms,

conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(j) (1994)

(j) Preferential treatment not to be granted on account of existing number of percentage imbalance

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

34 C.F.R. § 106.41

§ 106.41 Athletics.

(a) *General.* No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

(b) *Separate teams.* Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports including boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

(c) *Equal opportunity.* A recipient which operates or sponsors inter-scholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

(1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;

(2) The provision of equipment and supplies;

(3) Scheduling of games and practice time;

(4) Travel and per diem allowance;

(5) Opportunity to receive coaching and academic tutoring;

(6) Assignment and compensation of coaches and tutors;

(7) Provision of locker rooms, practice and competitive facilities;

(8) Provision of medical and training facilities and services;

(9) Provision of housing and dining facilities and services;

(10) Publicity.

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute non-compliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

(d) *Adjustment period.* A recipient which operates or sponsors inter-scholastic, intercollegiate, club or intramural athletics at the elementary school level shall comply fully with this section as expeditiously as possible but in no event later than one year from the effective date of this regulation. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the secondary or post-secondary school level shall comply fully with this section as expeditiously as possible but in no event later than three years from the effective date of this regulation.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682; and Sec. 844, Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484)

44 Fed. Reg. 71413-71419

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Office for Civil Rights

Office of the Secretary

45 CFR Part 86

Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics

AGENCY: Office for Civil Rights, Office of the Secretary, HEW.

ACTION: Policy interpretation.

SUMMARY: The following Policy Interpretation represents the Department of Health, Education, and Welfare's interpretation of the intercollegiate provisions of Title IX of the Education Amendments of 1972 and its implementing regulation. Title IX prohibits educational programs and institutions funded or otherwise supported by the Department from discriminating on the basis of sex. The Department published a proposed Policy Interpretation for public comment on December 11 1978. Over 700 comments reflecting a broad range of opinion were received. In addition, HEW staff visited eight universities during June and July, 1979, to see how the proposed policy and other suggested alternatives would apply in actual practice at individual campuses. The final Policy Interpretation reflects the many comments HEW received and the results of the individual campus visits.

EFFECTIVE DATE: December 11, 1979

FOR FURTHER INFORMATION CONTACT: Colleen O'Connor, 330 Independence Avenue, Washington, D.C. (202)245-6671

SUPPLEMENTARY INFORMATION:

I. Legal Background

A. The Statute

Section 901(a) of Title IX of the Education Amendments of 1972 provides:

> No person in the United States shall, on the basis of sex, be excluded from participation, in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

Section 844 of the Education Amendments of 1974 further provides:

> The Secretary of (of HEW) shall prepare and publish * * * proposed regulations implementing the provisions of Title IX of the Education Amendments of 1972 relating to the prohibition of sex discrimination in federally assisted education programs which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports.

Congress passed Section 844 after the Conference Committee deleted a Senate floor amendment that would have exempted revenue-producing athletics from the jurisdiction of Title IX.

B. The Regulation

The regulation implementing Title IX is set forth, in pertinent part, in the Policy Interpretation below. It was signed by President Ford on May 27, 1975, and submitted to the Congress for review pursuant to Section 431(d)(1) of the General Education Provisions Act (GEPA).

During this review, the House Subcommittee on Postsecondary Education held hearings on a resolution dis-

approving the regulation. The Congress did not disapprove the regulation within the 45 days allowed under GEPA, and it therefore became effective on July 21, 1975.

Subsequent hearings were held in the Senate Subcommittee on Education on a bill to exclude revenues produced by sports to the extent they are used to pay the costs of those sports. The Committee, however, took no action on this bill.

The regulation established a three year transition period to give institutions time to comply with its equal athletic opportunity requirements. That transition period expired on July 21, 1978.

II. Purpose of Policy Interpretation

By the end of July 1978, the Department had received nearly 100 complaints alleging discrimination in athletics against more than 50 institutions of higher education. In attempting to investigate these complaints, and to answer questions from the university community, the Department determined that it should provide further guidance on what constitutes compliance with the law. Accordingly, this Policy Interpretation explains the regulation so as to provide a framework within which the complaints can be resolved, and to provide institutions of higher education with additional guidance on the requirements for compliance with Title IX in intercollegiate athletic programs.

III. Scope of Application

This Policy Interpretation is designed specifically for intercollegiate athletics. However, its general principles will often apply to club, intramural, and interscholastic athletic programs, which are also covered by regulation.[1]

[1] The regulation specifically refers to club sports separately from intercollegiate athletics. Accordingly, under this Policy Interpretation, club teams will not be considered to be intercollegiate teams

Accordingly, the Policy Interpretation may be used for guidance by the administrators of such programs when appropriate.

This policy interpretation applies to any public or private institution, person or other entity that operates an educational program or activity which receives or benefits from financial assistance authorized or extended under a law administered by the Department. This includes educational institutions whose students participate in HEW funded or guaranteed student loan or assistance programs. For further information see definition of "recipient" in Section 86.2 of the Title IX regulation.

IV. Summary of Final Policy Interpretation

The final Policy Interpretation clarifies the meaning of "equal opportunity" in intercollegiate athletics. It explains the factors and standards set out in the law and regulation which the Department will consider in determining whether an institution's intercollegiate athletics program complies with the law and regulations. It also provides guidance to assist institutions in determining whether any disparities which may exist between men's and women's programs are justifiable and nondiscriminatory. The Policy Interpretation is divided into three sections:

• *Compliance in Financial Assistance (Scholarships) Based on Athletic Ability:* Pursuant to the regulation, the governing principle in this area is that all such assistance should be available on a substantially proportional basis to the number of male and female participants in the institution's athletic program.

• *Compliance in Other Program Areas (Equipment and supplies; games and practice times; travel and per diem; coaching and academic tutoring; assignment and compen-*

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except in those instances where they regularly participate in varsity competition.

sation of coaches and tutors; locker rooms, and practice and competitive facilities; medical and training facilities; housing and dining facilities; publicity; recruitment; and support services): Pursuant to the regulation, the governing principle is that male and female athletes should receive equivalent treatment, benefits, and opportunities.

• *Compliance in Meeting the Interests and Abilities of Male and Female Students:* Pursuant to the regulation, the governing principle in this area is that the athletic interests and abilities of male and female students must be equally effectively accommodated.

V. Major Changes to Proposed Policy Interpretation

The final Policy Interpretation has been revised from the one published in proposed form on December 11, 1978. The proposed Policy Interpretation was based on a two-part approach. Part I addressed equal opportunity for participants in athletic programs. It required the elimination of discrimination in financial support and other benefits and opportunities in an institution's existing athletic program. Institutions could establish a presumption of compliance if they could demonstrate that:

• "Average per capita" expenditures for male and female athletes were substantially equal in the area of "readily financially measurable" benefits and opportunities or, if not, that any disparities were the result of nondiscriminatory factors, and

• Benefits and opportunities for male and female athletes, in areas which are not financially measurable, "were comparable."

Part II of the proposed Policy Interpretation addressed an institution's obligation to accommodate effectively the athletic interests and abilities of women as well as men on a continuing basis. It required an institution either:

• To follow a policy of development of its women's athletic program to provide the participation and compe-

tition opportunities needed to accommodate the growing interests and abilities of women, or

• To demonstrate that it was effectively (and equally) accommodating the athletic interests and abilities of students, particularly as the interests and abilities of women students developed.

While the basic considerations of equal opportunity remain, the final Policy Interpretation sets forth the factors that will be examined to determine an institution's actual, as opposed to presumed, compliance with Title IX in the area of intercollegiate athletics.

The final Policy Interpretation does not contain a separate section on institutions' future responsibilities. However, institutions remain obligated by the Title IX regulation to accommodate effectively the interests and abilities of male and female students with regard to the selection of sports and levels of competition available. In most cases, this will entail development of athletic programs that substantially expand opportunities for women to participate and compete at all levels.

The major reasons for the changes in approach are as follows:

(1) Institutions and representatives of athletic program participants expressed a need for more definitive guidance on what constituted compliance than the discussion of a presumption of compliance provided. Consequently the final Policy Interpretation explains the meaning of "equal athletic opportunity" in such a way as to facilities an assessment of compliance.

(2) Many comments reflected a serious misunderstanding of the presumption of compliance. Most institutions based objections to the proposed Policy Interpretation in part on the assumption that failure to provide compelling justifications for disparities in per capita expenditures would have automatically resulted in a finding of noncom-

pliance. In fact, such a failure would only have deprived an institution of the benefit of the presumption that it was in compliance with the law. The Department would still have had the burden of demonstrating that the institution was actually engaged in unlawful discrimination. Since the purpose of issuing a policy interpretation was to clarify the regulation, the Department has determined that the approach of stating actual compliance factors would be more useful to all concerned.

(3) The Department has concluded that purely financial measures such as the per capita test do not in themselves offer conclusive documentation of discrimination, except where the benefit or opportunity under review, like a scholarship, is itself financial in nature. Consequently, in the final Policy Interpretation, the Department has detailed the factors to be considered in addressing actual compliance. While per capita breakdowns and other devices to examine expenditures patterns will be used as tools of analysis in the Department's investigative process, it is achievement of "equal opportunity" for which recipients are responsible and to which the final Policy Interpretation is addressed.

A description of the comments received, and other information obtained through the comment/consultation process, with a description of Departmental action in response to the major points raised, is set forth at Appendix "B" to this document.

VI. Historic Patterns of Intercollegiate Athletics Program Development and Operations

In its proposed Policy Interpretation of December 11, 1978, the Department published a summary of historic patterns affecting the relative status of men's and women's athletic programs. The Department has modified that summary to reflect additional information obtained during the comment and consultation process. The summary is set forth at Appendix A to this document.

VII. The Policy Interpretation

This Policy Interpretation clarifies the obligations which recipients of Federal aid have under Title IX to provide equal opportunities in athletic programs. In particular, this Policy Interpretation provides a means to assess an institution's compliance with the equal opportunity requirements of the regulation which are set forth at 45 CFR 86.37(c) and 86.41(c).

A. Athletic Financial Assistance (Scholarships)

1. *The Regulation*—Section 86.37(c) of the regulation provides:

> [Institutions] must provide reasonable opportunities for such award [of financial assistance] for members of each sex in proportion to the number of students of each sex participating in * * * inter-collegiate athletics.[2]

2. *The Policy*—The Department will examine compliance with this provision of the regulation primarily by means of a financial comparison to determine whether proportionately equal amounts of financial assistance (scholarship aid) are available to men's and women's athletic programs. The Department will measure compliance with this standard by dividing the amounts of aid available for the members of each sex by the numbers of male or female participants in the athletic program and comparing the results. Institutions may be found in compliance if this comparison results in substantially equal amounts or if a resulting disparity can be explained by adjustments to take into account legitimate, nondiscriminatory factors. Two such factors are:

a. At public institutions, the higher costs of tuition for students from out-of-state may in some years be unevenly distributed between men's and women's programs.

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[2] See also § 86.37(a) of the regulation.

These differences will be considered nondiscriminatory if they are not the result of policies or practices which disproportionately limit the availability of out-of-state scholarships to either men or women.

b. An institution may make reasonable professional decisions concerning the awards most appropriate for program development. For example, team development initially may require spreading scholarships over as much as a full generation (four years) of student athletes. This may result in the award of fewer scholarships in the first few years than would be necessary to create proportionality between male and female athletes.

3. *Application of the Policy*—a. This section does not require a proportionate number of scholarships for men and women or individual scholarships of equal dollar value. It does mean that the total amount of scholarship aid made available to men and women must be substantially proportionate to their participation rates.

b. When financial assistance is provided in forms other than grants, the distribution of non-grant assistance will also be compared to determine whether equivalent benefits are proportionately available to male and female athletes. A disproportionate amount of work-related aid or loans in the assistance made available to the members of one sex, for example, could constitute a violation of Title IX.

4. *Definition*—For purposes of examining compliance with this Section, the participants will be defined as those athletes:

a. Who are receiving the institutionally-sponsored support normally provided to athletes competing at the institution involved, e.g., coaching, equipment, medical and training room services, on a regular basis during a sport's season; and

b. Who are participating in organized practice sessions and other team meetings and activities on a regular basis during a sport's season; and

c. Who are listed on the eligibility or squad lists maintained for each sport, or

d. Who, because of injury, cannot meet a, b, or c above but continue to receive financial aid on the basis of athletic ability.

B. Equivalence in Other Athletic Benefits and Opportunities

1. *The Regulation*—The Regulation requires that recipients that operate or sponsor interscholastic, intercollegiate, club, or intramural athletics, "provide equal athletic opportunities for members of both sexes." In determining whether an institution is providing equal opportunity in intercollegiate athletics, the regulation requires the Department to consider, among others, the following factors:

(1)[3]

(2) Provision and maintenance of equipment and supplies;

(3) Scheduling of games and practice times;

(4) Travel and per diem expenses;

(5) Opportunity to receive coaching and academic tutoring;

(6) Assignment and compensation of coaches and tutors;

(7) Provision of locker rooms, practice and competitive facilities;

(8) Provisions of medical and training services and facilities;

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[3] 86.41(c)(1) on the accommodation of student interests and abilities, is covered in detail in the following Section C of this policy Interpretation.

(9) Provision of housing and dining services and facilities; and

(10) Publicity

Section 86.41(c) also permits the Director of the Office for Civil Rights to consider other factors in the determination of equal opportunity. Accordingly, this Section also addresses recruitment of student athletes and provision of support services.

This list is not exhaustive. Under the regulation, it may be expanded as necessary at the discretion of the Director of the Office for Civil Rights.[4]

2. *The Policy*—The Department will assess compliance with both the recruitment and the general athletic program requirements of the regulation by comparing the availability, quality and kinds of benefits, opportunities, and treatment afforded members of both sexes. Institutions will be in compliance if the compared program components are equivalent, that is, equal or equal in effect. Under this standard, identical benefits, opportunities, or treatment are not required, provided the overall effect of any differences is negligible.

If comparisons of program components reveal that treatment, benefits, or opportunities are not equivalent in kind, quality or availability, a finding of compliance may still be justified if the differences are the result of nondiscriminatory factors. Some of the factors that may justify these differences are as follows:

a. Some aspects of athletic programs may not be equivalent for men and women because of unique aspects of particular sports or athletic activities. This type of distinction was called for by the "Javits' Amendment"[5] to Title IX, which instructed HEW to make "reasonable

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[4] See also 86.41(a) and (b) of the regulation.

[5] Section 844 of the Education Amendments of 1974, Pub. L. 93-380, Title VIII. (August 21, 1974) 88 Stat. 612.

(regulatory) provisions considering the nature of particular sports" in intercollegiate athletics.

Generally, these differences will be the result of factors that are inherent to the basic operation of specific sports. Such factors may include rules of play, nature/replacement of equipment, rates of injury resulting from participation, nature of facilities required for competition, and the maintenance/upkeep requirements of those facilities. For the most part, differences involving such factors will occur in programs offering football, and consequently these differences will favor men. If sport-specific needs are met equivalently in both men's and women's programs, however, differences in particular program components will be found to be justifiable.

b. Some aspects of athletic programs may not be equivalent for men and women because of legitimately sex-neutral factors related to special circumstances of a temporary nature. For example, large disparities in recruitment activity for any particular year may be the result of annual fluctuations in team needs for first-year athletes. Such differences are justifiable to the extent that they do not reduce overall equality of opportunity.

c. The activities directly associated with the operation of a competitive event in a single-sex sport may, under some circumstances, create unique demands or imbalances in particular program components. Provided any special demands associated with the activities of sports involving participants of the other sex are met to an equivalent degree, the resulting differences may be found nondiscriminatory. At many schools, for example, certain sports—notably football and men's basketball— traditionally draw large crowds. Since the costs of managing an athletic event increase with crowd size, the overall support made available for event management to men's and women's programs may differ in degree and kind. These differences would not violate Title IX if the recipient does not limit the potential for women's athletic events to rise in specta-

tor appeal and if the levels of event management support available to both programs are based on sex-neutral criteria (e.g., facilities used, projected attendance, and staffing needs).

d. Some aspects of athletic programs may not be equivalent for men and women because institutions are undertaking voluntary affirmative actions to overcome effects of historical conditions that have limited participation in athletics by the members of one sex. This is authorized at § 86.3(b) of the regulation.

3. *Application of the Policy—General Athletic Program Components—a. Equipment and Supplies (§ 86.41 (c)(2)).* Equipment and supplies include but are not limited to uniforms, other apparel, sport-specific equipment and supplies, general equipment and supplies, instructional devices, and conditioning and weight training equipment.

Compliance will be assessed by examining, among other factors, the equivalence for men and women of:

(1) The quality of equipment and supplies;

(2) The amount of equipment and supplies;

(3) The suitability of equipment and supplies;

(4) The maintenance and replacement of the equipment and supplies; and

(5) The availabilty of equipment and supplies.

b. *Scheduling of Games and Practice Times (§ 86.41 (c)(3)).* Compliance will be assessed by examining, among other factors, the equivalence for men and women of:

(1) The number of competitive events per sport;

(2) The number and length of practice opportunities;

(3) The time of day competitive events are scheduled;

(4) The time of day practice opportunities are scheduled; and

(5) The opportunities to engage in available pre-season and post-season competition.

c. *Travel and Per Diem Allowances (§ 86.41(c)(4)).* Compliance will be assessed by examining, among other factors, the equivalence for men and women of:

(1) Modes of transportation;

(2) Housing furnished during travel;

(3) Length of stay before and after competitive events;

(4) Per diem allowances; and

(5) Dining arrangements.

d. *Opportunity to Receive Coaching and Academic Tutoring (§ 86.41(c)(5)).* (1) Coaching—Compliance will be assessed by examining, among other factors:

(a) Relative availability of full-time coaches;

(b) Relative availability of part-time and assistant coaches; and

(c) Relative availability of graduate assistants.

(2) Academic tutoring—Compliance will be assessed by examining, among other factors, the equivalence for men and women of:

(a) The availability of tutoring; and

(b) Procedures and criteria for obtaining tutorial assistance.

e. *Assignment and Compensation of Coaches and Tutors (§ 86.41(c)(6)).*[6] In general, a violation of Section

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[6] The Department's jurisdiction over the employment practices of recipients under Subpart E, §§ 86.51-86.61 of the Title IX regulation has been successfully challenged in several court cases. Accordingly, the Department has suspended enforcement of Subpart E, Section 86.41(c)(6) of the regulation, however, authorizes the

86.41(c)(6) will be found only where compensation or assignment policies or practices deny male and female athletes coaching of equivalent quality, nature, or availability.

Nondiscriminatory factors can affect the compensation of coaches. In determining whether differences are caused by permissible factors, the range and nature of duties, the experience of individual coaches, the number of participants for particular sports, the number of assistant coaches supervised, and the level of competition will be considered.

Where these or similar factors represent valid differences in skill, effort, responsibility or working conditions they may, in specific circumstances, justify differences in compensation. Similarly, there may be unique situations in which a particular person may possess such an outstanding record of achievement as to justify an abnormally high salary.

(1) Assignment of Coaches—Compliance will be assessed by examining, among other factors, the equivalence for men's and women's coaches of:

(a) Training, experience, and other professional qualifications;

(b) Professional standing.

(2) Assignment of Tutors—Compliance will be assessed by examining, among other factors, the equivalence for men's and women's tutors of:

(a) Tutor qualifications;

(b) Training, experience, and other qualifications.

Department to consider the compensation of coaches of men and women in the determination of the equality of athletic opportunity provided to male and female athletes. It is on this section of the regulation that this Policy Interpretation is based.

(3) Compensation of Coaches—Compliance will be asssessed by examining, among other factors, the equivalence for men's and women's coaches of:

(a) Rate of compensation (per sport, per season);

(b) Duration of contracts;

(c) Conditions relating to contract renewal;

(d) Experience;

(e) Nature of coaching duties performed;

(f) Working conditions; and

(g) Other terms and conditions of employment.

(4) Compensation of Tutors—Compliance will be assessed by examining, among other factors, the equivalence for men's and women's tutors of:

(a) Hourly rate of payment by nature of subjects tutored;

(b) Pupil loads per tutoring season;

(c) Tutor qualifications;

(d) Experience;

(e) Other terms and conditions of employment.

f. *Provision of Locker Rooms, Practice and Competitive Facilities (§ 86.41(c)(7)).* Complance will be assessed by examining, among other factors, the equivalence for men and women of:

(1) Quality and availability of the facilities provided for practice and competitive events;

(2) Exclusivity of use of facitlities provided for practice and competitive events;

(3) Availability of locker rooms;

(4) Quality of locker rooms;

(5) Maintenance of practice and competitive facilities; and

(6) Preparation of facilities for practice and competitive events.

g. *Provision of Medical and Training Facilities and Services (§ 86.41(c)(8)).* Compliance will be assessed by examining, among other factors, the equivalence for men and women of:

(1) Availability of medical personnel and assistance;

(2) Health, accident and injury insurance coverage;

(3) Availability and quality of weight and training facilities;

(4) Availability and quality of conditioning facilities; and

(5) Availability and qualifications of athletic trainers.

h. *Provision of Housing and Dining Facilities and Services (§ 86.41(c)(9)).* Compliance will be assessed by examining, among other factors, the equivalence for men and women of:

(1) Housing provided;

(2) Special services as part of housing arrangements (e.g., laundry facilities, parking space, maid service).

i. *Publicity (§ 86.41(c)(10)).* Compliance will be assessed by examining, among other factors, the equivalence for men and women of:

(1) Availability and quality of sports information personnel;

(2) Access to other publicity resources for men's and women's programs; and

(3) Quantity and quality of publications and other promotional devices featuring men's and women's programs.

4. *Application of the Policy—Other Factors (§ 86.41 (c)).* a. *Recruitment of Student Athletes.*[7] The athletic recruitment practices of institutions often affect the overall provisions of opportunity to male and female athletes. Accordingly, where equal athletic opportunities are not present for male and female students, compliance will be assessed by examining the recruitment practices of the athletic programs for both sexes to determine whether the provision of equal opportunity will require modification of those practices:

Such examinations will review the following factors:

(1) Whether coaches or other professional athletic personnel in the programs serving male and female athletes are provided with substantially equal opportunities to recruit;

(2) Whether the financial and other resources made available for recruitment in male and female athletic programs are equivalently adequate to meet the needs of each program; and

(3) Whether the differences in benefits, opportunities, and treatment afforded prospective student athletes of each sex have a disproportionately limiting effect upon the recruitment of students of either sex.

b. *Provision of Support Services.* The administrative and clerical support provided to an athletic program can

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[7] Public undergraduate institutions are also subject to the general anti-discrimination provision at § 86.23 of the regulation, which reads in part:

"A recipient * * * shall not discriminate on the basis of sex in the recruitment and admission of students. A recipient may be required to undertake additional recruitment efforts for one sex as remedial action * * * and may choose to undertake such efforts as affirmative action* * *"

Accordingly, institutions subject to § 86.23 are required in all cases to maintain equivalently effective recruitment programs for both sexes and, under § 86.41(c), to provide equivalent benefits, opportunities, and treatment to student athletes of both sexes.

affect the overall provision of opportunity to male and female athletes, particularly to the extent that the provided services enable coaches to perform better their coaching functions.

In the provision of support services, compliance will be assessed by examining, among other factors, the equivalence of:

(1) The amount of administrative assistance provided to men's and women's programs;

(2) The amount of secretarial and clerical assistance provided to men's and women's programs.

5. *Overall Determination of Compliance.* The Department will base its compliance determination under § 86.41 (c) of the regulation upon an examination of the following:

a. Whether the policies of an institution are discriminatory in language or effect; or

b. Whether disparities of a substantial and unjustified nature exist in the benefits, treatment, services, or opportunities afforded male and female athletes in the institution's program as a whole; or

c. Whether disparities in benefits, treatment, services, or opportunities in individual segments of the program are substantial enough in and of themselves to deny equality of athletic opportunity.

C. Effective Accommodation of Student Interests and Abilities.

1. *The Regulation.* The regulation requires institutions to accommodate effectively the interests and abilities of students to the extent necessary to provide equal opportunity in the selection of sports and levels of competition available to members of both sexes.

Specifically, the regulation, at § 86.41(c)(1), requires the Director to consider, when determining whether equal opportunities are available—

> Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes.

Section 86.41(c) also permits the Director of the Office for Civil Rights to consider other factors in the determinaton of equal opportunity. Accordingly, this section also addresses competitive opportunities in terms of the competitive team schedules available to athletes of both sexes.

2. *The Policy.* The Department will assess compliance with the interests and abilities section of the regulation by examining the following factors:

a. The determination of athletic interests and abilities of students;

b. The selection of sports offered; and

c. The levels of competition available including the opportunity for team competition.

3. *Application of the Policy—Determination of Athletic Interests and Abilities.*

Institutions may determine the athletic interests and abilities of students by nondiscriminatory methods of their choosing provided:

a. The processes take into account the nationally increasing levels of women's interests and abilities;

b. The methods of determining interest and ability do not disadvantage the members of an underrepresented sex;

c. The methods of determining ability take into account team performance records; and

d. The methods are responsive to the expressed interests of students capable of intercollegiate competition who are members of an underrepresented sex.

4. *Application of the Policy—Selection of Sports.*

In the selecton of sports, the regulation does not require institutions to integrate their teams nor to provide exactly the same choice of sports to men and women. However, where an institution sponsors a team in a particular sport for members of one sex, it may be required either to permit the excluded sex to try out for the team or to sponsor a separate team for the previously excluded sex.

a. Contact Sports—Effective accommodation means that if an institution sponsors a team for members of one sex in a contact sport, it must do so for members of the other sex under the following circumstances:

(1) The opportunities for members of the excluded sex have historically been limited; and

(2) There is sufficient interest and ability among the members of the excluded sex to sustain a viable team and a reasonable expectation of intercollegiate competition for that team.

b. Non-Contact Sports—Effective accommodation means that if an institution sponsors a team for members of one sex in a non-contact sport, it must do so for members of the other sex under the following circumstances:

(1) The opportunities for members of the excluded sex have historically been limited;

(2) There is sufficient interest and ability among the members of the excluded sex to sustain a viable team and a reasonable expectation of intercollegiate competition for that team; and

(3) Members of the excluded sex do not possess sufficient skill to be selected for a single integrated team, or to compete actively on such a team if selected.

5. *Application of the Policy—Levels of Competition.*

In effectively accommodating the interests and abilities of male and female athletes, institutions must provide both the opportunity for individuals of each sex to participate in intercollegiate competition, and for athletes of each sex to have competitive team schedules which equally reflect their abilities.

a. Compliance will be assessed in any one of the following ways:

(1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or

(2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or

(3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the *interests and abilities of the members of* that sex have been fully and effectively accommodated by the present program.

b. Compliance with this provision of the regulation will also be assessed by examining the following:

(1) Whether the competitive schedules for men's and women's teams, on a program-wide basis, afford proportionally similar numbers of male and female athletes equivalently advanced competitive opportunities; or

(2) Whether the institution can demonstrate a history and continuing practice of upgrading the competitive opportunities available to the historically disadvantaged sex

as warranted by developing abilities among the athletes of that sex.

c. Institutions are not required to upgrade teams to intercollegiate status or otherwise develop intercollegiate sports absent a reasonable expectation that intercollegiate competition in that sport will be available within the institution's normal competitive regions. Institutions may be required by the Title IX regulation to actively encourage the development of such competition, however, when overall athletic opportunities within that region have been historically limited for the members of one sex.

6. *Overall Determination of Compliance.*

The Department will base its compliance determination under § 86.41(c) of the regulation upon a determination of the following:

a. Whether the policies of an institution are discriminatory in language or effect; or

b. Whether disparities of a substantial and unjustified nature in the benefits, treatment, services, or opportunities afforded male and female athletes exist in the institution's program as a whole; or

c. Whether disparities in individual segments of the program with respect to benefits, treatment, services, or opportunities are substantial enough in and of themselves to deny equality of athletic opportunity.

VIII. The Enforcement Process

The process of Title IX enforcement is set forth in § 86.71 of the Title IX regulations, which incorporates by reference the enforcement procedures applicable to Title VI of the Civil Rights Act of 1964.[8] The enforcement process prescribed by the regulation is supplemented

[8] Those procedures may be found at 45 CFR 80.6-80.11 and 45 CFR Part 8.

by an order of the Federal District Court, District of Columbia, which establishes time frames for each of the enforcement steps.[9]

According to the regulation, there are two ways in which enforcement is *initiated:*

• *Compliance Reviews*—Periodically the Department must select a number of recipients (in this case, colleges and universities which operate intercollegiate athletic programs) and conduct investigations to determine whether recipients are complying with Title IX. [45 CFR 80.7(a))

• *Complaints*—The Department must investigate all valid (written and timely) complaints alleging discrimination on the basis of sex in a recipient's programs. (45 CFR 80.7(b))

The Department must inform the recipient (and the complainant, if applicable) of the results of its investigation. If the investigation indicates that a recipient is in compliance, the Department states this, and the case is closed. If the investigation indicates noncompliance, the Department outlines the violations found.

The Department has 90 days to conduct an investigation and inform the recipient of its findings, and an additional 90 days to resolve violations by obtaining a voluntary compliance agreement from the recipient. This is done through negotiations between the Department and the recipient, the goal of which is agreement on steps the recipient will take to achieve compliance. Sometimes the violation is relatively minor and can be corrected immediately. At other times, however, the negotiations result in a plan that will correct the violations within a specified period of time. To be acceptable, a plan must describe the manner in which institutional resources will be used to correct the violation. It also must state acceptable time

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[9] *WEAL* v. *Harris*, Civil Action No. 74-1720(D. D.C., December 29, 1977):

tables for reaching interim goals and full compliance. When agreement is reached, the Department notifies the institution that its plan is acceptable. The Department then is obligated to review periodically the implementation of the plan.

An institution that is in violation of Title IX may already be implementing a corrective plan. In this case, prior to informing the recipient about the results of its investigation, the Department will determine whether the plan is adequate. If the plan is not adequate to correct the violations (or to correct them within a reasonable period of time) the recipient will be found in noncompliance and voluntary negotiations will begin. However, if the institutional plan is acceptable, the Department will inform the institution that although the institution has violations, it is found to be in compliance because it is implementing a corrective plan. The Department, in this instance also, would monitor the progress of the institutional plan. If the institution subsequently does not completely implement its plan, it will be found in noncompliance.

When a recipient is found in noncompliance and voluntary compliance attempts are unsuccessful, the formal process leading to termination of Federal assistance will be begun. These procedures, which include the opportunity for a hearing before an administrative law judge, are set forth at 45 CFR 80.8-80.11 and 45 CFR Part 81.

IX. Authority

(Secs. 901, 902, Education Amendment of 1972, 86 Stat. 373, 374, 20 U.S.C. 1681, 1682; sec. 844, Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 612; and 45 CFR Part 86)

Dated: December 3, 1979.

Roma Stewart,

Director, Office for Civil Rights, Department of Health, Education and Welfare.

Dated: December 4, 1979.

Patricia Roberts Harris.

Secretary, Department of Health, Education, and Welfare.

Appendix A—Historical Patterns of Intercollegiate Athletics Program Development

1. Participation in intercollegiate sports has historically been emphasized for men but not women. Partially as a consequence of this, participation rates of women are far below those of men: During the 1977-78 academic year women students accounted for 48 percent of the national undergraduate enrollment (5,496,000 of 11,267,000 students).[1] Yet, only 30 percent of the intercollegiate athletes are women.[2]

The historic emphasis on men's intercollegiate athletic programs has also contributed to existing differences in the number of sports and scope of competition offered men and women. One source indicates that, on the average, colleges and universities are providing twice the number of sports for men as they are for women.[3]

2. Participation by women in sports is growing rapidly. During the period from 1971-1978, for example; the number of female participants in organized high school sports increased from 294,000 to 2,083,000—an increase of over 600 percent.[4] In contrast, between Fall 1971 and Fall 1977, the enrollment of females in high school decreased from approximately 7,600,000 to approximately 7,150,000 a decrease of over 5 percent.[5]

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[1] *The Condition of Education 1979*, National Center for Education Statistics, p. 112.

[2] Figure obtained from Association for Intercollegiate Athletics for Women (AIAW) member survey. *AIAW Structure Implementation Survey Data Summary*, October 1978, p. 11.

[3] U.S. Commission on Civil Rights, Comments to DHEW on proposed Policy Interpretation: Analysis of data supplied by the National Association of Directors of Collegiate Athletics.

[4] Figures obtained from National Federation of High School Association (NFHSA) data.

[5] *Digest of Education Statistics 1977-78*, National Center for Education Statistics (1978), Table 40, at 44. Data, by sex, are

The growth in athletic participation by high school women has been reflected on the campuses of the nation's colleges and universities. During the period from 1971 to 1976 the enrollment of women in the nation's institutions of higher education rose 52 percent, from 3,400,000 to 5,201,000.[6] During this same period, the number of women participating in intramural sports increased 108 percent from 276,167 to 576,167. In club sports, the number of women participants increased from 16,386 to 25,541 or 55 percent. In intercollegiate sports, women's participation increased 102 percent from 31,852 to 64,375.[7] These developments reflect the growing interest of women in competitive athletics, as well as the efforts of colleges and universities to accommodate those interests.

3. The overall growth of women's intercollegiate programs has not been at the expense of men's programs. During the past decade of rapid growth in women's programs, the number of intercollegiate sports available for men has remained stable, and the number of male athletes has increased slightly. Funding for men's programs has increased from $1.2 to $2.2 million between 1970-1977 alone.[8]

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unavailable for the period from 1971 to 1977; consequently, these figures represent 50 percent of total enrollment for that period. This is the best comparison that could be made based on available data.

[6] Ibid., p. 112.

[7] These figures, which are not precisely comparable to those cited at footnote 2, were obtained from *Sports and Recreational Programs of the Nation's Universities and Colleges*. NCAA Report No. 5, March 1978. It includes figures only from the 722 NCAA member institutions because comparable data was not available from other associations.

[8] Compiled from NCAA *Revenues and Expenses for Intercollegiate Athletic Programs*, 1978.

4. On most campuses, the primary problem confronting women athletes is the absence of a fair and adequate level of resources, services, and benefits. For example, disproportionately more financial aid has been made available for male athletes than for female athletes. Presently, in institutions that are members of both the National Collegiate Athletic Asociation (NCAA) and the Association for Intercollegiate Athletics for Women (AIAW), the average annual scholarship budget is $39,000. Male athletes receive $32,000 or 78 percent of this amount, and female athletes receive $7,000 or 22 percent, although women are 30 percent of all the athletes eligible for scholarships.[9]

Likewise, substantial amounts have been provided for the recruitment of male athletes, but little funding has been made available for recruitment of female athletes.

Congressional testimony on Title IX and subsequent surveys indicates that discrepancies also exist in the opportunity to receive coaching and in other benefits and opportunities, such as the quality and amount of equipment, access to facilities and practice times, publicity, medical and training facilities, and housing and dining facilities.[10]

5. At several institutions, intercollegiate football is unique among sports. The size of the teams, the expense of the operation, and the revenue produced distinguish football from other sports, both men's and women's. Title IX requires that "an institution of higher education must comply with the prohibition against sex discrimination im-

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[9] Figures obtained from *AIAW Structure Implementation Survey Data Summary*, October, 1978, p. 11.

[10] 121 Cong. REc. 29791-95 (1975) (remarks of Senator Williams): Comments by Senator Bayh. Hearings on S. 2106 Before the Subcommittee on Education of the Senate Committee on Labor and Public Welfare, 94th Congress, 1st Session 48 (1975): "Survey of Women's Athletic Directors," AIAW Workshop (January 1978).

posed by that title and its implementing regulations in the administration of any revenue producing intercollegiate athletic activity." [11] However, the unique size and cost of football programs have been taken into account in developing this Policy Interpretation.

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[11] See April 18, 1979, Opinion of General Counsel, Department of Health, Education, and Welfare, page 1.

INTERIM

TITLE IX INTERCOLLEGIATE ATHLETICS INVESTIGATOR'S MANUAL

* * * *

CHAPTER SEVEN

ACCOMMODATION OF STUDENT INTERESTS AND ABILITIES
35 CFR § 106.41(C)(1)

TITLE IX REGULATION AND POLICY INTERPRETATION

The Title IX regulation requires institutions to accommodate effectively the interests and abilities of students to the extent necessary to provide equal opportunity in the selection of sports and levels of competition available to both sexes. As used in the regulation and in the Policy Interpretation, "levels of competition" refers to the opportunity to compete in each of the various forms of collegiate—competition e.g., intramural, club, and intercollegiate—while "selection of sports" means type of sport —e.g., basketball, swimming—offered at the intercollegiate level.

The regulation also authorizes the Assistant Secretary to consider other factors in determining whether an institution is providing equal opportunity, and the Policy Interpretation explains that the competitive opportunity available to athletes of both sexes will be considered. As used in the Policy Interpretation, "competitive opportunity" refers to the degree of challenge represented by the competitive schedules of intercollegiate terms.

The Policy Interpretation states:

> The Department will assess compliance with the interests and abilities section of the regulation by examining the following factors:

a. The determination of athletic interests and abilities of students;

b. The selection of sports offered; and

c. The levels of competition available including the opportunity for team competition.

Thus, the Policy Interpretation explains that equal accommodation of student interests and abilities concerns the kinds of intercollegiate participation opportunities (selection of sports), availability of intercollegiate participation opportunities (levels of competition), and quality of intercollegiate participation opportunities (competitive opportunity) available to students of both sexes. Accordingly, as with other program components, compliance determinations require assessment of the comparative availability, quality, and variety of intercollegiate participation opportunities afforded male and female students. Differences between men's and women's programs are justifiable if they are attributable to demonstrated differences in the interests and abilities of the members of each sex. Generally, disparities in the quality of competition will require explanation only in terms of the interests and abilities of intercollegiate athletes, while differences in the availability and variety of participation opportunities must be justified by the interests and abilities in the larger student population.

Title IX does not require institutions to offer the identical sports, a proportional number of intercollegiate participation opportunities (with respect to the division by sex of the total student enrollment) or the same team competitive opportunities to men and women. Rather, it requires institutions to meet the interests and abilities of women to the same degree as they meet the interests and abilities of men, by providing opportunities which address the interests and abilities of each sex equally.

Additionally, you should remember that a determination of whether the institution has selected sports and levels

of competition to accommodate equally effectively the interests and abilities of both sexes, must be considered together with your determination under the other factors (see Chapter six) which the Policy Interpretation directs you to assess in reaching your conclusion on the institution's compliance. (Please refer to Chapter eight for a discussion on the overall assessment of compliance).

* * * *

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

The Assistant Secretary

Jan. 16, 1996

Dear Colleague:

It is my pleasure to send you the enclosed "Clarification of Intercollegiate Atheltics Policy Guidance: The Three-Part Test" (the Clarification).

As you know, the Office for Civil Rights (OCR) enforces Title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of sex in education programs and activities. The regulation implementing Title IX and the Department's Intercollegiate Athletics Policy Interpretation published in 1979—both of which followed publication for notice and the receipt, review and consideration of extensive comments—specifically address intercollegiate athletics. Since becoming Assistant Secretary, I have recognized the need to provide additional clarification regarding what is commonly referred to as the "three-part test," a test used to determine whether students of both sexes are provided nondiscriminatory opportunities to participate in athletics. The three-part test is described in the Department's 1979 Policy Interpretation.

Accordingly, on September 20, 1995, OCR circulated to over 4500 interested parties a draft of the proposed Clarification, soliciting comments about whether the document provided sufficient clarity to assist institutions in their efforts to comply with Title IX. As indicated when circulating the draft of the Clarification, the objective of the Clarification is to respond to requests for specific guidance about the existing standards that have guided the enforcement of Title IX in the area of intercollegiate athletics. Further, the Clarification is limited to an elaboration of the "three-part test." This test, which has generated the majority of the questions that have been raised about Title

IX compliance, is a portion of a larger analytical framework reflected in the 1979 Policy Interpretation.

OCR appreciates the efforts of the more than 200 individuals who commented on the draft of the Clarification. In addition to providing specific comments regarding clarity, some parties suggested that the Clarification did not go far enough in protecting women's sports. Others, by contrast, suggested that the Clarification, or the Policy Interpretation itself, provided more protection for women's sports than intended by Title IX. However, it would not be appropriate to revise the 1979 Policy Interpretation, and adherence to its provision shaped OCR's consideration of these comments. The Policy Interpretation has guided OCR's enforcement in the area of athletics for over fifteen years, enjoying the bipartisan support of Congress. The Policy Interpretation has also enjoyed the support of every court that has addressed issues of Title IX athletics. As one recent court decision recognized, the "three-part test" draws its "essence" from the Title IX statute.

The draft has been revised to incorporate suggestions that OCR received regarding how to make the document more useful and clearer. For instance, the Clarification now has additional examples to illustrate how to meet part one of the three-part test and makes clear that the term "developing interests" under part two of the test includes interests that already exist at the institution. The document also clarifies that an institution can choose which part of the test it plans to meet. In addition, it further clarifies how Title IX requires OCR to count participation opportunities and why Title IX does not require an institution, under part three of the test, to accommodate the interests and abilities of potential students.

OCR also received requests for clarification that relate primarily to fact- or institution-specific situations that only apply to a small number of athletes or institutions. These comments are more appropriately handled on an individ-

ual basis and, accordingly, OCR will follow-up on these comments and questions in the context of OCR's ongoing technical assistance efforts.

It is important to outline several points about the final document.

The Clarification confirms that institutions need to comply with only any one part of the three-part test in order to provide nondiscirminatory participation opportunities for individuals of both sexes. The first part of the test—substantial proportionality—focuses on the participation rates of men and women at an institution and affords an institution a "safe harbor" for establishing that it provides nondiscriminatory participation opportunities. An institution that does not provide substantially proportional participation opportunities for men and women may comply with Title IX by satisfying either part two or part three of the test. The second part—history and continuing practice—is an examination of an institution's good faith expansion of athletic opportunities through its response to developing interests of the underrepresented sex at that institution. The third part—fully and effectively accommodating interests and abilities of the underrepresented sex—centers on the inquiry of whether there are concrete and viable interests among the underrepresentd sex that should be accommodated by an institution.

In addition, the Clarification does not provide strict numercial formulas or "cookie cutter" answers to the issues that are inherently case- and fact-specific. Such an effort not only would belie the meaning of Title IX, but would at the same time deprive institutions of the flexibility to which they are entitled when deciding how best to comply with the law.

Several parties who provided comments expressed opposition to the three-part test. The crux of the arguments made on behalf of those opposed to the three-part test is that the test does not really provide three different ways

to comply. Opponents of the test assert, therefore, that the improperly establishes arbitrary quotas. Similarly, they also argue that the three-part test runs counter to the intent of Title IX because it measures gender discrimination by underrepresentation and requires the full accommodation of only one sex. However, this understanding of Title IX and the three-part test is wrong.

First, it is clear from the Clarification that there are three different avenues of compliance. Institutions have flexibility in providing nondiscriminatory participation opportunities to their students, and OCR does not require quotas. For example, if an institution chooses to and does comply with part three of the test, OCR will not require it to provide substantially proportionate participation opportunities to, or demonstrate a history and continuing practice of program expansion that is responsive to the developing interests of, the underrepresented sex. In fact, if an institution believes that its female students are less interested and able to play intercollegiate sports, that institution may continue to provide more athletic opportunities to men than to women, or even to add opportunities for men, as long as the recipient can show that its female students are not being denied opportunities, i.e., that women's interests and abilities are fully and effectively accommodated. The fact that each part of the three-part test considers participation rates does not mean, as some opponents of the test have suggested, that the three parts do not provide different ways to comply with Title IX.

Second, it is appropriate for parts two and three of the test to focus only on the underrepresented sex. Indeed, such a focus is required because Title IX, by definition, addresses discrimination. Notably, Title IX's athletic provisions are unique in permitting institutions—notwithstanding the long history of discrimination based on sex in athletics programs to establish separate athletic programs on the basis of sex, thus allowing institutions to determine the number of athletic opportunities that are

available to students of each sex. (By contrast, Title VI of the Civil Rights Act of 1964 forbids institutions from providing separate athletic programs on the basis of race or national origin.)

OCR focuses on the interests and abilities of the underrepresented sex only if the institutions provides proportionately fewer athletic opportunities to members of one sex and has failed to make a good faith effort to expand its program for the underrepresented sex. Thus, the Policy Interpretation requires the full accommodation of the underrepresented sex only to the extent necessary to provide equal athletic opportunity, i.e., only where an institution has failed to respond to the interests and abilities of the underrepresented sex when it allocated a disproportionately large number of opportunities for athletes of the other sex.

What is clear then—because, for example, part three of the three-part test permits evidence that underrepresentation is caused not by discrimination but by lack of interest —is that underrepresentation alone is not the measure of discrimination. Substantial proportionality merely provides institutions with a safe harbor. Even if this were not the case and proportional opportunities were the only test, the "quota" criticism would be misplaced. Quotas are impermissible where opportunities are required to be created without regard to sex. However, schools are permitted to create athletic participation opportunities based on sex. Where they do so unequally, that is a legitimate measure of unequal opportunity under Title IX. OCR has chosen to make substantial proportionality only one of three alternative measures.

Several parties also suggested that, in determining the number of participation opportunities offered by an institution, OCR count unfilled slots, i.e., those positions on a team that an institution claims the team can support but which are not filled by actual athletes. OCR must, however, count actual athletes because participation op-

portunities must be real, not illusory. Moreover, this makes sense because, under other parts of the Policy Interpretation, OCR considers the quality and kind of other benefits and opportunities offered to male and female athletes in determining overall whether an institution provides equal athletic opportunity. In this context, OCR must consider actual benefits provided to real students.

OCR also received comments that indicate that there is still confusion about the elimination and capping of men's teams in the context of Title IX compliance. The rules here are straightforward. An institution can choose to eliminate or cap teams as a way of complying with part one of the three-part test. However, nothing in the Clarification requires that an institution cap or eliminate participation opportunities for men. In fact, cutting or capping men's teams will not help an institution comply with part two or par tthree of the test because these tests measure an institution's positive, ongoing response to the interests and abilities of the underrepresented sex. Ultimately, Title IX provides institutions with flexibility and choice regarding how they will provide nondiscriminatory participation opportunities.

Finally, several parties suggested that OCR provide more information regarding the specific elements of an appropriate assesment of student interest and ability. The Policy Interpretation is intended to give institutions flexibility to determine interests and abilities consistent with the unique circumstances and needs of an institution. We recognize, however, that it might be useful to share ideas on good assessment strategies. Accordingly, OCR will work to identify, and encourage institutions to share, good strategies that institutions have developed, as well as to facilitate discussions among institutions regarding potential assessment techniques.

OCR recognizes that the question of how to comply with Title IX and to provide equal athletic oportunities for all

students is a significant challenge that many institutions face today, especially in the face of increasing budget constraints. It has been OCR's experience, however, that institutions committed to maintaining their men's program have been able to do so—and comply with Title IX—notwithstanding limited athletic budgets. In many cases, OCR and these institutions have worked together to find creative solutions that ensured equal opportunities in intercollegiate athletics. OCR is similarly prepared to join with other institutions in assisting them to address their own situations.

OCR is committed to continuing to work in partnership with colleges and universities to ensure that the promise of Title IX becomes a reality for all students. Thank you for your continuing interest in this subject.

Sincerely,

/s/ Norma V. Cantu
NORMA V. CANTU
Assistant Secretary
for Civil Rights

Enclosure

CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY GUIDANCE: THE THREE-PART TEST

The Office for Civil Rights (OCR) enforces Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* (Title IX), which prohibits discrimination on the basis of sex in education programs and activities by recipients of federal funds. The regulation implementing Title IX at 34 C.F.R. Part 106, effective July 21, 1975, contains specific provisions governing athletic programs, at 34 C.F.R. § 106.41, and the awarding of athletic scholarships, 34 C.F.R. § 106.37(c). Further clarification of the Title IX regulatory requirements is provided by the Intercollegiate Athletics Policy Interpretation, issued December 11, 1979 (44 *Fed. Reg.* 71413 *et seq.* (1979)).[1]

The Title IX regulation provides that if an institution sponsors an athletic program it must provide equal athletic opportunities for members of both sexes. Among other factors, the regulation requires that an institution must effectively accommodate the athletic interests and abilities of students of both sexes to the extent necessary to provide equal athletic opportunity.

The 1979 Policy Interpretation provides that as part of this determination OCR will apply the following three-part test to assess whether an institution is providing nondiscriminatory participation opportunities for individuals of both sexes:

1. Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or

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[1] The Policy Interpretation is designed for intercollegiate athletics. However, its general principles, and those of this Clarification, often will apply to elementary and secondary interscholastic athletic programs, which are also covered by the regulation. *See* 44 *Fed. Reg.* 71413.

2. Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of that sex; or

3. Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a history and continuing practice of program expansion, as described above, whether it can be demonstrated that the interests and abiliities of the members of that sex have been fully and effectively accommodated by the present program.

44 *Fed. Reg.* at 71418.

Thus, the three-part test furnishes an institution with three individual avenues to choose from when determining how it will provide individuals of each sex with nondiscriminatory opportunities to participate in intercollegiate athletics. If an institution has met any part of the three-part test, OCR will determine that the institution is meeting this requirement.

It is important to note that under the Policy Interpretation the requirement to provide nondiscriminatory participation opportunities is only one of many factors that OCR examines to determine if an institution is in compliance with the athletics provision of Title IX. OCR also considers the quality of competition offered to members of both sexes in order to determine whether an institution effectively accommodates the interests and abilities of its students.

In addition, when an "overall determination of compliance" is made by OCR, 44 *Fed. Reg.* 71417, 71418, OCR examines the institution's program as a whole. Thus, OCR considers the effective accommodation of interests and abilities in conjunction with equivalence in the avail-

ability, quality and kinds of other athletic benefits and opportunities provided male and female athletes to determine whether an institution provides equal athletic opportunity as required by Title IX. These other benefits include coaching, equipment, practice and competitive facilities, recruitment, scheduling of games, and publicity, among others. An institution's failure to provide nondiscriminatory participation opportunities usually amounts to a denial of equal athletic opportunity because these opportunities provide access to all other athletic benefits, treatment, and services.

This Clarification provides specific factors that guide an analysis of each part of the three-part test. In addition, it provides examples to demonstrate, in concrete terms, how these factors will be considered. These examples are intended to be illustrative, and the conclusions drawn in each example are based solely on the facts included in the example.

THREE-PART TEST—Part One: Are Participation Opportunities Substantially Proportionate to Enrollment?

Under part one of the three-part test (part one), where an institution provides intercollegiate level athletic participation opportunities for male and female students in numbers substantially proportionate to their respective full-time undergraduate enrollments, OCR will find that the institution is providing nondiscriminatory participation opportunities for individuals of both sexes.

OCR's analysis begins with a determination of the number of participation opportunities afforded to male and female athletes in the intercollegiate athletic program. The Policy Interpretation defines participants as those athletes:

a. Who are receiving the institutionally-sponsored support normally provided to athletes competing at the institution involved, e.g., coaching, equip-

ment, medical and training room services, on a regular basis during a sport's season; and

b. Who are participating in organized practice sessions and other team meetings and activities on a regular basis during a sport's season; and

c. Who are listed on the eligibility or squad lists maintained for each sport, or

d. Who, because of injury, cannot meet a, b, or c above but continue to receive financial aid on the basis of athletic ability.

44 *Fed. Reg.* at 71415.

OCR uses this definition of participant to determine the number of participation opportunities provided by an institution for purposes of the three-part test.

Under this definition, OCR considers a sport's season to commence on the date of a team's first intercollegiate competitive event and to conclude on the date of the team's final intercollegiate competitive event. As a general rule, all athletes who are listed on a team's squad or eligibility list and are on the team as of the team's first competitive event are counted as participants by OCR. In determining the number of participation opportunities for the purposes of the interests and abilities analysis, an athlete who participates in more than one sport will be counted as a participant in each sport in which he or she participates.

In determining participation opportunities, OCR includes, among others, those athletes who do not receive scholarships (e.g., walk-ons), those athletes who compete on teams sponsored by the institution even though the team may be required to raise some or all of its operating funds, and those athletes who practice but may not compete. OCR's investigations reveal that these athletes receive numerous benefits and services, such as training and prac-

tice time, coaching, tutoring services, locker room facilities, and equipment, as well as important non-tangible benefits derived from being a member of an intercollegiate athletic team. Because these are significant benefits, and because receipt of these benefits does not depend on their cost to the institution or whether the athlete competes, it is necessary to count all athletes who receive such benefits when determining the number of athletic opportunities provided to men and women.

OCR's analysis next determines whether athletic opportunities are substantially proportionate. The Title IX regulation allows institutions to operate separate athletic programs for men and women. Accordingly, the regulation allows an institution to control the respective number of participation opportunities offered to men and women. Thus, it could be argued that to satisfy part one there should be no difference between the participation rate in an institution's intercollegiate athletic program and its full-time undergraduate student enrollment.

However, because in some circumstances it may be unreasonable to expect an institution to achieve exact proportionality—for instance, because of natural fluctuations in enrollment and participation rates or because it would be unreasonable to expect an institution to add athletic opportunities in light of the small number of students that would have to be accommodated to achieve exact proportionality—the Policy Interpretation examines whether participation opportunities are "substantially" proportionate to enrollment rates. Because this determination depends on the institution's specific circumstances and the size of its athletic program, OCR makes this determination on a case-by-case basis, rather than through use of a statistical test.

As an example of a determination under part one: If an institution's enrollment is 52 percent male and 48 percent female and 52 percent of the participants in the athletic

program are male and 48 percent female, then the institution would clearly satisfy part one. However, OCR recognizes that natural fluctuations in an institution's enrollment and/or participation rates may affect the percentages in a subsequent year. For instance, if the institution's admissions the following year resulted in an enrollment rate of 51 percent males and 49 percent females, while the participation rates of males and females in the athletic program remained constant, the institution would continue to satisfy part one because it would be unreasonable to expect the institution to fine tune its program in response to this change in enrollment.

As another example, over the past five years an institution has had a consistent enrollment rate for women of 50 percent. During this time period, it has been expanding its program for women in order to reach proportionatity. In the year that the institution reaches its goal—i.e., 50 percent of the participants in its athletic program are female—its enrollment rate for women increases to 52 percent. Under these circumstances, the institution would satisfy part one.

OCR would also consider opportunities to be substantially proportionate when the number of opportunities that would be required to achieve proportionality would not be sufficient to sustain a viable team, i.e., a team for which there is a sufficient number of interested and able students and enough available competition to sustain an intercollegiate team. As a frame of reference in assessing this situation, OCR may consider the average size of teams offered for the underrepresented sex, a number which would vary by institution.

For instance, Institution A is a university with a total of 600 athletes. While women make up 52 percent of the university's enrollment, they only represent 47 percent of its athletes. If the university provided women with 52 percent of athletic opportunities, approximately 62 addi-

tional women would be able to participate. Because this is a significant number of unaccommodated women, it is likely that a viable sport could be added. If so, Institution A has not met part one.

As another example, at Institution B women also make up 52 percent of the university's enrollment and represent 47 percent of Institution B's athletes. Institution B's athletic program consists of only 60 participants. If the University provided women with 52 percent of athletic opportunities, approximately 6 additional women would be able to participate. Since 6 participants are unlikely to support a viable team, Institution B would meet part one.

THREE-PART TEST—Part Two: Is there a History and Continuing Practice of Program Expansion for the Underrepresented Sex?

Under part two of the three-part test (part two), an institution can show that it has a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the underrepresented sex. In effect, part two looks at an institution's past and continuing remedial efforts to provide nondiscriminatory participation opportunities through program expansion.[2]

OCR will review the entire history of the athletic program, focusing on the participation opportunities provided for the underrepresented sex. First, OCR will assess whether past actions of the institution have expanded par-

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[2] Part two focuses on whether an institution has expanded the number of intercollegiate participation opportunities provided to the underrepresented sex. Improvements in the quality of competition, and of other athletic benefits, provided to women athletes, while not considered under the three-part test, can be considered by OCR in making an overall determination of compliance with the athletics provision of Title IX.

ticipation opportunities for the underrepresented sex in a manner that was demonstrably responsive to their developing interests and abilities. Developing interests include interests that already exist at the institution.[3] There are no fixed intervals of time within which an institution must have added participation opportunities. Neither is a particular number of sports dispositive. Rather, the focus is on whether the program expansion was responsive to developing interests and abilities of the underrepresented sex. In addition, the institution must demonstrate a continuing (i.e., present) practice of program expansion as warranted by developing interests and abilities.

OCR will consider the following factors, among others, as evidence that may indicate a *history of program expansion* that is demonstrably responsive to the developing interests and abilities of the underrepresented sex:

- an institution's record of adding intercollegiate teams, or upgrading teams to intercollegiate status, for the underrepresented sex;
- an institution's record of increasing the numbers of participants in intercollegiate athletics who are members of the underrepresented sex; and
- an institution's affirmative responses to requests by students or others for addition or elevation of sports.

OCR will consider the following factors, among others, as evidence that may indicate a *continuing practice of program expansion* that is demonstrably responsive to the developing interests and abilities of the underrepresented sex:

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[3] However, under this part of the test an institution is not required, as it is under part three, to accommodate all interests and abilities of the underrepresented sex. Moreover, under part two an institution has flexibility in choosing which teams it adds for the underrepresented sex, as long as it can show overall a history and continuing practice of program expansion for members of that sex.

- an institution's current implementation of a nondiscriminatory policy or procedure for requesting the addition of sports (including the elevation of club or intramural teams) and the effective communication of the policy or procedure to students; and
- an institution's current implementation of a plan of program expansion that is responsive to developing interests and abilities.

OCR would also find persuasive an institution's efforts to monitor developing interests and abilities of the underrepresented sex, for example, by conducting periodic nondiscriminatory assessments of developing interests and abilities and taking timely actions in response to the results.

In the event that an institution eliminated any team for the underrepresented sex, OCR would evaluate the circumstances surrounding this action in assessing whether the institution could satisfy part two of the test. However, OCR will not find a history and continuing practice of program expansion where an institution increases the proportional participation opportunities for the underrepresnted sex by reducing opportunities for the overrepresented sex alone or by reducing participation opportunities for the overrepresented sex to a proportionately greater degree than for the underrepresented sex. This is because part two considers an institution's good faith remedial efforts through actual program expansion. It is only necessary to examine part two if one sex is overrepresented in the athletic program. Cuts in the program for the underrepresented sex, even when coupled with cuts in the program for the overrepresented sex, cannot be considered remedial because they burden members of the sex already disadvantaged by the present program. However, an institution that has eliminated some participation opportunities for the underrepresented sex can still meet part two if, overall, it can show a history and continuing practice of program expansion for that sex.

In addition, OCR will not find that an institution satisfies part two where it established teams for the underrepresented sex only at the initiation of its program for the underrepresented sex or where it merely promises to expand its program for the underrepresented sex at some time in the future.

The following examples are intended to illustrate the principles discussed above.

At the inception of its women's program in the mid-1970s, Institution C established seven teams for women. In 1984 it added a woman's varsity team at the request of students and coaches. In 1990 it upgraded a women's club sport to varsity team status based on a request by the club members and an NCAA survey that showed a significant increase in girls high school participation in that sport. Institution C is currently implementing a plan to add a varsity women's team in the spring of 1996 that has been identified by a regional study as an emerging women's sport in the region. The addition of these teams resulted in an increased percentage of women participating in varsity athletics at the institution. Based on these facts, OCR would find Institution C in compliance with part two because it has a history of program expansion and is continuing to expand its program for women in response to their developing interests and abilities.

By 1980, Institution D established seven teams for women. Institution D added a women's varsity team in 1983 based on the requests of students and coaches. In 1991 it added a women's varsity team after an NCAA survey showed a significant increase in girls' high school participation in that sport. In 1993 Institution D eliminated a viable women's team and a viable men's team in an effort to reduce its athletic budget. It has taken no action relating to the underrepresented sex since 1993. Based on these facts, OCR would not find Institution D in compliance with part two. Institution D cannot show a continuing practice of program expansion that is responsive to the

developing interests and abilities of the underrepresented sex where its only action since 1991 with regard to the underrepresented sex was to eliminate a team for which there was interest, ability and available competition.

In the mid-1970s, Institution E established five teams for women. In 1979 it added a women's varsity team. In 1984 it upgraded a women's club sport with twenty-five participants to varsity team status. At that time it eliminated a women's varsity team that had eight members. In 1987 and 1989 Institution E added women's varsity teams that were identified by a significant number of its enrolled and incoming female students when surveyed regarding their athletic interests and abilities. During this time it also increased the size of an existing women's team to provide opportunities for women who expressed interest in playing that sport. Within the past year, it added a women's varsity team based on a nationwide survey of the most popular girls high school teams. Based on the addition of these teams, the percentage of women participating in varsity athletics at the institution has increased. Based on these facts, OCR would find Institution E in compliance with part two because it has a history of program expansion and the elimination of the team in 1984 took place within the context of continuing program expansion for the underrepresented sex that is responsive to their developing interests.

Institution F started its women's program in the early 1970s with four teams. It did not add to its women's program until 1987 when, based on requests of students and coaches, it upgraded a women's club sport to varsity team status and expanded the size of several existing women's teams to accommodate significant expressed interest by students. In 1990 it surveyed its enrolled and incoming female students; based on that survey and a survey of the most popular sports played by women in the region, Institution F agreed to add three new women's teams by 1997. It added a women's team in 1991 and 1994. Institution F is implementing a plan to add a women's

team by the spring of 1997. Based on these facts, OCR would find Institution F in compliance with part two. Institution F's program history since 1987 shows that it is committed to program expansion for the underrepresented sex and it is continuing to expand its women's program in light of women's developing interests and abilities.

THREE-PART TEST—Part Three: Is the Institution Fully and Effectively Accommodating the Interests and Abilities of the Underrepresented Sex?

Under part three of the three-part test (part three) OCR determines whether an institution is fully and effectively accommodating the interests and abilities of its students who are members of the uderrepresented sex—including students who are admitted to the institution though not yet enrolled. Title IX provides that a recipient must provide equal athletic opportunity to its students. Accordingly, the Policy Interpretation does not require an institution to accommodate the interests and abilities of potential students.[4]

While disproportionately high athletic participation rates by an institution's students of the overrepresented sex (as compared to their enrollment rates) may indicate that an institution is not providing equal athletic opportunities to its students of the underrepresented sex, an institution can satisfy part three where there is evidence that the imbalance does not reflect discrimination, i.e., where it can be demonstrated that, notwithstanding disproportionately low participation rates by the institution's students of the underrepresented sex, the interests and abilities of these students are, in fact, being fully and effectively accommo-

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[4] However, OCR does examine an institution's recruitment practices under another part of the Policy Interpretation. *See* 44 Fed. Reg. 71417. Accordingly, where an institution recruits potential student athletes for its men's teams, it must ensure that women's teams are provided with substantially equal opportunities to recruit potential student athletes.

dated. In making this determination, OCR will consider whether there is (a) unmet interest in a particular sport; (b) sufficient ability to sustain a team in the sport; and (c) a reasonable expectation of competition for the team. If all three conditions are present OCR will find that an institution has not fully and effectively accommodated the interests and abilities of the underrepresented sex.

If an institution has recently eliminated a viable team from the intercollegiate program, OCR will find that there is sufficient interest, ability, and available competition to sustain an intercollegiate team in that sport unless an institution can provide strong evidence that interest, ability, or available competition no longer exists.

a) Is there sufficient unmet interest to support an intercollegiate team?

OCR will determine whether there is sufficient unmet interest among the institution's students who are members of the underrepresented sex to sustain an intercollegiate team. OCR will look for interest by the underrepresented sex as expressed through the following indicators, among others:

- requests by students and admitted students that a particular sport be added;
- requests that an existing club sport be elevated to intercollegiate team status;
- participation in particular club or intramural sports;
- interviews with students, admitted students, coaches, administrators and others regarding interest in particular sports;
- results of questionnaires of students and admitted students regarding interests in particular sports; and
- participation in particular interscholastic sports by admitted students.

In addition, OCR will look at participation rates in sports in high schools, amateur athletic associations, and community sports leagues that operate in areas from which

the institution draws its students in order to ascertain likely interest and ability of its students and admitted students in particular sport(s).[5] For example, where OCR's investigation finds that a substantial number of high schools from the relevant region offer a particular sport which the institution does not offer for the underrepresented sex, OCR will ask the institution to provide a basis for any assertion that its students and admitted students are not interested in playing that sport. OCR may also interview students, admitted students, coaches, and others regarding interest in that sport.

An institution may evaluate its athletic program to assess the athletic interest of its students of the underrepresented sex using nondiscriminatory methods of its choosing. Accordingly, institutions have flexibility in choosing a nondiscriminatory method of determining athletic interests and abilities provided they meet certain requirements. *See* 44 *Fed. Reg.* at 71417. These assessments may use straightforward and inexpensive techniques, such as a student questionnaire for an open forum, to identify students' interests and abilities. Thus, while OCR expects that an institution's assessment should reach a wide audience of students and should be open-ended regarding the sports students can express interest in, OCR does not require elaborate scientific validation of assessments.

An institution's evaluation of interest should be done periodically so that the institution can identify in a timely and responsive manner any developing interests and abilities of the underrepresented sex. The evaluation should also take into account sports played in the high schools and communities from which the institution draws its students both as an indication of possible interest on campus and to permit the institution to plan to meet the interests of admitted students of the underrepresented sex.

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[5] While these indications of interest may be helpful to OCR in ascertaining likely interest on campus, particularly in the absence of more direct indicia, an institution is expected to meet the actual interests and abilities of its students and admitted students.

b) Is there sufficient ability to sustain an intercollegiate team?

Second, OCR will determine whether there is sufficient ability among interested students of the underrepresented sex to sustain an intercollegiate team. OCR will examine indications of ability such as:

- the athletic experience and accomplishments—in interscholastic, club or intramural competition—of students and admitted students interested in playing the sport;
- opinions of coaches, administrators, and athletes at the institution regarding whether interested students and admitted students have the potential to sustain a varsity team; and
- if the team has previously competed at the club or intramural level, whether the competitive experience of the team indicates that it has the potential to sustain an intercollegiate team.

Neither a poor competitive record nor the inability of interested students or admitted students to play at the same level of competition engaged in by the institution's other athletes is conclusive evidence of lack of ability. It is sufficient that interested students and admitted students have the potential to sustain an intercollegiate team.

c) Is there a reasonable expectation of competition for the team?

Finally, OCR determines whether there is a reasonable expectation of intercollegiate competition for a particular sport in the institution's normal competitive region. In evaluating available competition, OCR will look at available competitive opportunities in the geographic area in which the institution's athletes primarily compete, including:

- competitive opportunities offered by other schools against which the institution competes; and

- competitive opportunities offered by other schools in the institution's geographic area, including those offered by schools against which the institution does not now compete.

Under the Policy Interpretation, the institution may also be required to actively encourage the development of intercollegiate competition for a sport for members of the underrepresented sex when overall athletic opportunities within its competitive region have been historically limited for members of that sex.

CONCLUSION

This discussion clarifies that institutions have three distinct ways to provide individuals of each sex with nondiscriminatory participation opportunities. The three-part test gives institutions flexibility and control over their athletics programs. For instance, the test allows institutions to respond to different levels of interest by its male and female students. Moreover, nothing in the three-part test requires an institution to eliminate participation opportunities for men.

At the same time, this flexibility must be used by institutions consistent with Title IX's requirement that they not discriminate on the basis of sex. OCR recognizes that institutions face challenges in providing nondiscriminatory participation opportunities for their students and will continue to assist institutions in finding ways to meet these challenges.

TRIAL EXHIBIT IIIII EXCERPTS FROM REPORT OF FINIS WELCH

Cohen, et al. vs Brown University

No. 92-197-P

Dated November 19, 1994

* * * *

[10]

XXIII. An extensive search and review of large nationally representative data sources reveals a consistent result; men express greater interest in, and actually participate in, competitive sports to a much larger degree than do women. A more detailed summary of the relevant findings appears in Section 5.

XXIV. None of the reviewed data sources contradicted this finding. None indicates a similar interest or level of participation between men and women.

* * * *

[18] Section 2. Interests

The tables presented in this section consider alternative norms for comparisons with the proportions of varsity athletes who are women. The idea in this section is to identify the proportion of women among those who are interested in and able to participate in varsity sports. Interests are approached primarily via direct questions of intent to participate while ability is inferred from recognition and experience arising from participation in high school.

Table 1. Brown Applicants' Interest in Participating in Sports

This is a summary of information from the computer files of applications from the five most recent

entering classes. This data, keypunched by Brown University personnel, includes 463 items from each of 65,829 application forms. It therefore includes over 30 million pieces of information. Here and throughout we follow the convention of referring to classes by their probable year of graduation.

The table describes the percentages of male and female applicants, for the individual classes 1994-1998 and for all five classes combined, whose computerized record shows an interest in participating in at least one college varsity sport. Alongside the percentages there are z-statistics that express the male-female difference in units of standard deviation.

Results are provided for three sets of applicants. First, these are summarized for all applicants. On average 64.4 percent of male applicants express such an interest although the percentage has fallen from 67.3 to 58.9 percent among the five classes considered. In contrast, only 45.7 percent of female applicants express an interest in participating in varsity sports. Interests among female applicants have also fallen, in this case, from 50.9 to 40.6 percent.

The second panel of the table limits applicants to those who were accepted and the third is restricted further to those who agree to their acceptance (i.e., those who committed). In each group, men are more likely then women to identify an interest in [19] participating in varsity sports. The male-female differences are large and statistically significant.

The winnowing process from applicant to acceptance increases the percentage of women who are interested from 45.7 to 46.4 percent. The percentage of women who are interested among those who commit is 46.3 percent.

Table 2. Representation of Women Among Those Expressing Interest in Participating in Sports

This table simply translates the percentages of interested applicants from the previous table to facilitate subsequent comparisons with the representation of women among those with opportunities to participate. Here the pools are restricted to those whose application shows an interest in participating in varsity athletics. The percentages of such persons who are women is then calculated. These calculations depend, first, on percentages of male and female applicants who are interested and, second, on the percentage of applicants who are female. The former percentages are given in the previous table and the latter ones are listed in the first column of this table. The resultant percentage appears in the second column.

Notice, however, that the fraction of applicants who are female has increased during the last five years such that 53-54 percent of current entering classes are female. According to the Sponsorship Forms filed with the NCAA, 51.1 percent of the 1993-94 student body was female, and the estimate for 1994-95 is 51.7 percent. In contrast, the Brown student body was 45.6 percent female as recently as 1989-90.

The final two columns of Table 2 adjust the female composition of applicant classes to the student body counts for the most recent academic years so that applicant interests can be compared with the representation of women among varsity participation opportunities.

* * * *

[21]

Table 8. Planned Participation in College Varsity Sports From the College Board Student Descriptive Questionnaire

This table derives from the College Board's student descriptive questionnaire among students sending information to Brown University. It provides an independent and confirming basis for calculating male-female differences in interests in college sports participation.

Although lower percentages of male and female applicants indicate interest in participation than is found in applications to Brown, the male-female differences are roughly the same. The College Board counts imply that women represent approximately 40 percent of those who are interested in participating in college varsity sports.

Table 8A. High School Varsity Participation of Students Sending SATs to Brown

This table, based on the College Board questionnaire, shows the average number of high school varsity sports played by male and female high school seniors who asked for their information to be sent to Brown.

Most of the varsity high school sports played by students interested in Brown are offered at Brown. On average, male high school students played more Brown-offered sports than did women. Male students also played more sports not currently offered at Brown.

Table 8B. Brown Freshman Students' Participation and Interest in Athletics, as Revealed in CIRP Freshman Survey

This table presents responses of Brown freshmen to questions on sports and athletics contained in the

Freshman Survey conducted by the Cooperative Institutional Research Program (CIRP).

* * * *

[93] Section 5. Larger Nationally Representative Surveys

National Education Longitudinal Study of 1988 (NELS: 88)

Background

- Conducted by National Opinion Research Center (NORC) under the auspices of the US Department of Education's National Center for Education Statistics (NCES)
- Nationally representative sample of 26,432 people who were in grade eight in 1988
- Panel survey: follow-ups conducted every two years

Relevant data

- Percentages of respondents who were members of an athletic team or sports club in the original survey and two followups
- Percentage of respondents on varsity teams during sophomore and senior years of high school
- Participation in several popular team sports
- Percentage of respondents who include schools' athletic reputations in selecting a college
- Percentage of respondents who believe others see them as athletic, and other indicators of the role of sports in the respondents' lives

Tables

- Sports participation, Table 31
- Participation in selected individual sports, Table 32

- Athletic self-image/Other issues, Table 33
- Athletic reputation and college choice, Table 37

Principal results

- Among college-bound high school students with high test scores, 42 percent to 45 percent of respondents participating in sports were female (Table 31)
- Female representation among high school varsity [94] athletes with high test scores was also in the 42 percent to 45 percent range (Table 31)
- Participation in sports is higher among college-bound high school seniors than among high school seniors in general (Table 31)
- Of college-bound seniors with high test scores indicating that athletic reputation was important, about 46 percent were females (Table 37)
- Female representation among high school sophomores participating in at least one sport other than football was about 45 percent in 1980 (Table 32)
- Among college-bound high school students with high test scores who said sports participation was important among their friends, about 45 percent were female (Table 33)

High School and Beyond (HSB)

Background

- Conducted by NORC under the auspices of the US Department of Education's National Center for Education Statistics (NCES)
- Nationally representative sample of 58,270 people who were high school sophomores or seniors in 1980
- Panel survey: followups conducted in 1982, 1984, 1986 and 1992

Relevant data

- Percentages of respondents who were members of an athletic team or sports club, in the original survey and in two followups
- Percentage of respondents on varsity teams during senior year of high school
- Percentage of respondents who include schools' athletic reputations in selecting a college
- Percentage of respondents who believe others see them as athletic and who attend professional sporting events

Tables

[95]

- Sports participation, Table 34
- Athletic self-image/Spectator involvement, Table 35
- Athletic reputation and college choice, Table 37

Principal results

- Among college-bound high school seniors in 1980 and 1982, 38 percent to 41 percent of respondents participating in sports were female (Table 34)
- Female representation among varsity athletes who were high school seniors was slightly lower, ranging from 33 percent to 37 percent (Table 34)
- Of high school students who believed others saw them as athletic, slightly over 40 percent were females (Table 35)
- Of college-bound seniors indicating that athletic reputation was important, about 45 percent were female (Table 37)

National Longitudinal Study of 1972 (NLS-72)

Background

- Conducted by NORC under the auspices of the US Department of Education's National Center for Education Statistics (NCES)
- Nationally representative sample of 19,000 people who were high school seniors in 1972
- Panel survey: followups conducted in 1973, 1974, 1976, 1979, and 1986

Relevant data

- Percentages of respondents who were members of an athletic team or sports club in the original survey and in followups
- Percentage of respondents who consider schools' athletic reputations in selecting a college

Tables

[96]

- Athletic Reputation and College Choice, Table 37

Principal results

- Among college-bound high school seniors in 1972, about 35 percent of respondents participating in sports were female (Table 36)
- Of college-bound seniors indicating that athletic reputation is important in selecting a college, 38 percent are female (Table 37)

CIRP Annual Freshman Survey

Background

- An annual survey of college freshmen conducted by the Cooperative Institutional Research Program (CIRP) at UCLA

- Sample of over 220,000 students at over 400 colleges and universities
- Latest results published in a series of reports titled "The American Freshman: National Norms for Fall 1993"
- We reviewed reports from odd-numbered years beginning 1983

Relevant data

- Percentages of students who devoted at least 16 hours per week to exercising or sports in the previous year, from 1985-1989
- Percentages of students who won a varsity letter in sports in the previous year, from 1987-1993

Tables

- Emphasis on exercise or sports (Tables 38-39)
- Participation in varsity athletics (Tables 40-41)
- Expect to participate in varsity athletics in college (Tables 43-43)

Principal results

[97]

- Between 43 percent and 45 percent of university freshmen who won letters their senior year of high school were female (Table 40)
- Between 32 percent and 36 percent of university freshmen who devoted 16 hours or more per week to exercise or sports were female (Table 38)
- Between 35 percent and 40 percent of university freshman expecting to participate in varsity sports were female (Table 42).

Monitoring the Future

Background

- Conducted by the University of Michigan's Institute for Social Research, with core funding from the National Institute on Drug Abuse
- Nationally representative sample of 15,000 to 20,000 high school seniors
- Survey has been conducted annually since 1975
- We tabulated responses from surveys conducted in 1977, 1983, and 1988

Relevant data

- Percentages of students who participated in sports, athletics, or exercising almost every day, at least once a week, a few times a year, and never

Table

- Daily participation in exercise or sports (Table 44)

Principal results

- Between 35 percent and 41 percent of high school seniors who participated in sports almost every day were female (Table 44)

[98]

Sports Participation Survey—National Federation of State High School Associations

Background

- Conducted annually by the National Federation of State High School Associations
- Questionnaire sent to high schools; 90 percent of high schools are reported to be members
- Survey has been conducted annually since 1971

Relevant data

- Numbers of schools with athletic programs in major sports, tabulated separately for boys and girls
- Numbers of male and female participants in major sports
- Total numbers of male and female participants in all high school sports
  - Figures double-count multiple-sport athletes

Tables

- Numbers of participants in popular sports, 1993 (Table 45)
- Numbers of participants in high school athletics, 1971-1993 (Table 46)

Principal results

- In the 1990s the female percentage of total high school sports participants has been above 35 percent but below 40 percent (Table 46)
- In 1993 basketball and track & field had the most female participants (Table 45)
  - Female programs accounted for 49 percent of all programs in these two sports
  - Female participants accounted for 44 percent and 45 percent, respectively, of all participants in these sports

[99]

National Health Interview Survey (NHIS)

Background

- Conducted annually under the auspices of the National Center for Health Statistics

- The survey is a large nationally representative sample containing over 30,000 respondents
- In 1985, 1990, and 1991 a supplement on "Health Promotion and Disease Prevention" contained questions on exercise, as well as other subjects such as nutrition, smoking, and stress

Relevant data

- Percentages of males and females of varying ages participating in specific activities during two week period prior to survey
- Percentages of males and females that exercise or play sports regularly

Table

- Youth participation in seelcted activities (Table 47)

Principal results

- Women represent about 42 percent of people 18-21 who exercise or play sports regularly (Table 47)
- Female representation in individual sports or activities is generally lower than that 42 percent figure (Table 47).

Earned Degree Conferred, U.S. Department of Education

Background

- The U.S. Department of Education collects annual statistics describing numbers of baccalaureate degrees by the gender of recipients.

Table

- By academic major, percentage of recipients who are female. Majors are ordered from highest to lowest percentage. (Table 48).

* * * *

TABLE 2

REPRESENTATION OF WOMEN AMONG THOSE EXPRESSING INTEREST IN PARTICIPATING IN SPORTS

Class	% in Class Who are Female	Of Those Naming One or More Sports: % Female	% Female Normed to 1993/94 Student Body	% Female Normed to 1994/95 Student Body
All Applicants				
1994	49.69	42.75	44.17	44.72
1995	48.21	40.02	42.86	43.40
1996	49.59	40.94	42.45	42.99
1997	51.67	42.78	42.26	42.80
1998	53.26	44.00	41.92	42.46
Accepted Applicants				
1994	50.12	42.44	43.44	43.98
1995	49.77	43.29	44.64	45.19
1996	53.00	45.93	44.08	44.63
1997	53.69	46.12	43.59	44.13
1998	53.45	45.91	43.62	44.16
Committed Applicants				
1994	51.05	43.61	43.70	44.24
1995	49.57	43.88	45.43	45.97
1996	52.21	45.38	44.32	44.86
1997	54.43	45.24	41.99	42.53
1998	54.09	45.67	42.75	43.29

Note:

In 1993/94, women accounted for 51.14 percent of students. In 1994/95 the corresponding number is 51.69 percent.

Comment:

Although women have represented 48 to 54 percent of candidates for admission to Brown in recent years, their representation among applicants expressing interest has been less than 46 percent.

Because the gender composition of the entering classes has changed over time, for later comparisons it is necessary to normalize measures of representation to the the composition of the student body.

* * * *

TABLE 8

PLANNED PARTICIPATION IN COLLEGE VARSITY SPORTS FROM THE COLLEGE BOARD DESCRIPTIVE QUESTIONNAIRE
(Students Sending SDQ Information to Brown University)

Respondents' Senior Year	Number Sent SDQ	Number Answering Q 31 [a]	Planning Varsity Participation: Number	Planning Varsity Participation: As Percent of Total Sent	Planning Varsity Participation: As Percent of Number Answering Q 31
Female					
94	9,491	9,139	2,832	29.84	30.99
93	9,032	8,727	2,795	30.95	32.03
92	8,748	8,476	2,694	30.80	31.78
Male					
94	8,121	7,736	3,763	46.34	48.64
93	7,990	7,633	3,750	46.93	49.13
92	8,301	7,973	4,039	48.66	50.66
Implied Representation of Women [b]					
94				39.17	38.91
93				39.74	39.46
92				38.76	38.55

Notes:

[a] Question 31 instructs respondents to identify any extracurricular activities they plan to participate in during college. One of the activities on the list is varsity sports.

[b] Assumes equal numbers of male and female students.

Comment:

This source provides additional measures of gender differences in sports participation. These measures imply that women represent about 40 percent of potential Brown applicants with interest in participating in college varsity sports.

* * * *

TABLE 46

MALE AND FEMALE PARTICIPATION
IN HIGH SCHOOL ATHLETICS

From *1993-94 Athletics Participation Survey* by the National Federation of State High School Associations

Numbers of Participants in High School Athletics

Year	Male	Female	Female Representation
1971	3,666,917	294,015	7.4
1975-76	4,109,021	1,645,039	28.6
1980-81	3,503,124	1,853,789	34.6
1985-86	3,354,284	1,757,884	34.4
1990-91	3,406,355	1,892,316	35.7
1991-92	3,429,853	1,940,801	36.1
1992-93	3,416,389	1,997,489	36.9
1993-94	3,478,530	2,124,755	37.9

Notes:

Participants — Students participating in two or more sports may be counted more than once.

Female Representation — Calculated from actual numbers of participants.

* * * *

TRIAL TESTIMONY EXCERPTS

MS. GORTON—CROSS

* * * *

[41] Q Do you have any idea of the relative participation of men to women in those intramural programs?

A Yes. It's probably about eight to one men.

Q Eight men to one women?

A Yes.

Q And there is an equal opportunity in those intramural programs for men and women to participate?

A Yes.

* * * *

MR. ROACH—DIRECT

[69] Q Do you know what the average number of teams which colleges and universities have in the United States?

MS. LABINGER: Objection.

THE COURT: Go ahead. I'll allow it.

Q I was asking, if I didn't say it, women's teams.

A I would say the average is somewhere slightly more than seven because the N.C.A.A. minimum sports [70] sponsorship, I believe, at this time, is still fourteen so it can be anywhere from seven to nine.

* * * *

[176] Q And in terms of the institution considering whether a team is viable, what are the factors which you look at as an athletic director?

A Well, I think you have to look at and see, first of all, what the league that you're in, whether it's a league sponsored or sanctioned sport. You would want to look at availability of competition throughout the region and within close proximity to your own institution. You would want to look at the number of high school students

available who would want to play that sport. You would want to look at your own facilities, whether they are adequate to [177] have practice and home competition. You would want to look at your facilities in terms of locker rooms. You would also want to look at the strain it might put n your trainers, compliance people, support personnel. There are a lot of different things that you would look at before you would add another program.

* * * *

MRS. TAYLOR—DIRECT

[89] Q Has Brown University structured a program that essentially provides approximately 40% of the opportunities to participate in varsity athletics to women and approximately 60% to men?

A No. Brown hasn't structured that program. I believe that ratio just happened and it demonstrates the interests and abilities of the student body but Brown did not set the ratio. That was determined by the participants based on the interest and ability.

* * * *

MR. WARD—DIRECT

[51] Q With respect to clubs, do you have, based upon your experience, an idea of the relative participation at the club level of men and women?

MS. LABINGER: Objection. Relevance.

THE COURT: I don't know if he's finished his question.

MS. LABINGER: I'm sorry.

THE COURT: Have you finished your question?

MR. JEFFREY MICHAELSON: Yes, I have.

THE COURT: I'll allow it. Go ahead.

A Getting precise numbers is difficult for the clubs but I would estimate it to be about three men for every woman participant. In the intramurals it's—there are probably—it's—the ratio is greater. There are more,

many more men participants than there are women participants.

Q And again, there is no limitation in terms of gender as to who decides to participate at those two levels, is that right?

A Not that I'm aware of, no.

* * * *

DR. WELCH—DIRECT

[33] MR. CONNOLLY: I don't know whether what the answer will yield or not. The question was, did he do any data verification.

THE COURT: Just answer "Yes" or "No."

A. Yes.

Q. Is there anything that you did in terms of data verification that suggested to you that women's interests in athletics were understated on the Brown University data base?

A. Were understated? No.

Q. Now going to table number 8, would you tell his Honor what that table purports to be?

A. Table 8 is a summary of the responses sent to Brown from the student demographic questionnaire that was filled out at the time that the applicant students took their S.A.T.'s.

Q. What conclusions do you draw from table 8, Doctor?

A. The key numbers in table 8 are in the bottom panel, which identify the number of students who had their questionnaires sent to Brown who indicate they plan to participate in varsity sports in college. And done two alternative ways, they show that somewhere between —of people who plan to participate in varsity sports— somewhere between 38 and 39 percent are women.

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(3)

FILED

MAR 20 1997

CLERK

No. 96-1321

In the Supreme Court of the United States

OCTOBER TERM, 1996

BROWN UNIVERSITY, ET AL.,
Petitioners,

v.

AMY COHEN, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF OF FORMER SECRETARY OF HEALTH, EDUCATION, AND WELFARE CASPAR W. WEINBERGER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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OCTOBER TERM, 1996

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BRIEF OF FORMER SECRETARY OF HEALTH, EDUCATION, AND WELFARE CASPAR W. WEINBERGER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE* AND SUMMARY OF ARGUMENT[1]

Mr. Weinberger served as Secretary of the Department of Health, Education, and Welfare ("HEW") during the period when HEW developed and published, over his signature, the implementing regulations that are at issue in this case. He was ultimately responsible for considering the very

[1] The parties' written consents to the filing of this brief are being filed today with the Clerk.

extensive public comment on the proposed regulations and for making the policy decisions that are embodied in the final rules. As such, he has a continuing interest in the appropriate enforcement of those regulations to ensure equal educational opportunity without undue interference in the academic freedom of regulated institutions.

The First Circuit's decision in this case is squarely at odds with the terms and intent of those regulations, as well as the Department's stated position at the time of their release. The court of appeals' test would prevent schools from choosing to provide opportunities in response to actual student interest. Instead, schools would be forced to allocate opportunities so as to equalize the rates of participation by men and women. But numerous provisions of the applicable regulations say otherwise: they authorize schools to provide opportunities on the basis of actual student interest and they impose no duty on schools to try to equalize participation rates in any particular activity (except as a remedy for the school's own prior discrimination).

The test adopted by the First Circuit will harm many hundreds of colleges and many thousands of students. And it is important for the Court to correct that error in this case, since the enormous cost of litigating this issue will make capitulation the only feasible course for most other schools. Accordingly, the Court should grant Brown's petition and reverse the decision below.

ARGUMENT

I. THE FIRST CIRCUIT'S TEST IS CONTRARY TO THE IMPLEMENTING REGULATIONS ISSUED BY SECRETARY WEINBERGER

Title IX of the Education Amendments of 1972 provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a), Pet. App. 252a. Congress directed HEW to prepare and publish implementing regulations, including "reasonable regulations" for intercollegiate athletic activities. Pet. App. 255a-56a. Secretary Weinberger issued proposed rules on June 20, 1974 (39 Fed. Reg. 22,228) and, following the receipt of over 9,700 written comments and the holding of public forums around the country, issued final rules on June 4, 1975 (40 Fed. Reg. 24,128). Those regulations remain in effect today and are the rules that govern the issue presented in this case.[2]

At the heart of its opinion, the First Circuit rejected Brown's position based on the court's assertion that:

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[2] The final regulations were initially codified at 45 C.F.R. Part 86. In 1980, when the Department of Education was created, the regulations were republished, without substantive change, at 34 C.F.R. Part 106. See 20 U.S.C. § 3441 and 45 Fed. Reg. 30,802 (May 9, 1980). For simplicity, this brief refers to the current citations in 34 C.F.R. Part 106.

> "even if it can be empirically demonstrated that, at a particular time, women have less interest in sports than do men, such evidence, standing alone, cannot justify providing fewer athletics opportunities for women than for men."

Pet. App. 42a. But that conclusion is flatly contrary to the HEW regulations and the preamble accompanying their release, both of which make it clear that Title IX does *not* require a school either:

- to ignore the actual interests of its students in affording them equal opportunity to participate in its programs; or
- to take affirmative action simply for the purpose of equalizing the number of men and women participating in particular programs.

First, Subpart A of the regulations, which applies to all facets of an institution's activities (athletics, admissions, academic programs, etc.), provides that a school may *voluntarily* choose to, but *has no obligation to*, take affirmative measures to overcome societal conditions that have resulted in a gender imbalance in its programs or activities. It says that:

> "In the absence of a finding of discrimination on the basis of sex in an education program or activity, a recipient *may* take affirmative action to overcome the effects of conditions which resulted in limited participation therein by persons of a particular sex."

34 C.F.R. § 106.3(b) (emphasis added). In the accompanying preamble, HEW explained that this provision "permits,

but *does not require*, affirmative efforts" by the school to overcome conditions that have resulted in relatively low participation in particular activities "by members of either sex." 40 Fed. Reg. 24,129 (emphasis added). And the preamble expressly confirmed that this provision is equally applicable to a school's athletic programs. *Id.* at 24,134.[3]

The First Circuit's ruling contravenes this provision. That ruling would force Brown to reallocate its teams and their funds simply to overcome the fact, perhaps caused by societal conditions, that the proportion of its current female students interested in participating in intercollegiate athletics is lower than that of its male students. The regulations clearly state that Brown has no such duty.

Second, portions of the regulations addressing various matters other than athletics expressly recognize that, for reasons having nothing to do with discrimination or violations of Title IX, a school's male and female students may choose to participate to different degrees in various programs. For example, the rules provide that, if an institution offers separate housing for men and women, such housing "shall be as a whole . . . [p]roportionate in quantity to the number of students of that sex *applying for* such housing." 34 C.F.R. § 106.32(b)(2)(i) (emphasis added). Similarly, the regulations provide that where "a particular class contains a substantially disproportionate number of individuals of one sex," the school's only duty is "to assure itself that such dis-

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[3] In fact, a provision in the proposed rules suggesting that schools might have such an obligation was deleted from the final rules, thus further underscoring this point. See 40 Fed. Reg. 24,134.

proportion is not the result of discrimination on the basis of sex . . . by [the school's] counselors." 34 C.F.R. § 106.36(c).[4] By recognizing that Title IX is not offended by such imbalances, these provisions further refute the First Circuit's position.

Finally, the First Circuit's ruling runs afoul of the regulations that specifically address intercollegiate athletics -- which, as noted above, Congress directed be "reasonable." In key part, the regulations provide that, in order to ensure "equal athletic *opportunity* for members of both sexes," the school is to consider "whether the selection of sports and levels of competition effectively accommodate the *interests* and abilities of members of *both* sexes." 34 C.F.R. § 106.41(c)(1) (emphasis added).[5] Thus, HEW expressly recognized that men and women may have different levels of interest, and authorized schools to take those varying levels of interest into account in order to ensure equal athletic "opportunity" for individuals of "both sexes." Further, the preamble accompanying the rules expressly noted that

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[4] Likewise, the accompanying preamble noted that while women might constitute a disproportionate percentage of a school's part-time employees, "[a]ssuming the absence of discriminatory hiring practices on the part of an employer which channel female job applicants into part-time positions, it is questionable whether the Department has the authority to" take any action in response to such an imbalance. 40 Fed. Reg. 24,136.

[5] The accompanying preamble explicitly confirmed that "[t]he Department's intent . . . is to require institutions to take the interests of both sexes into account in determining what sports to offer." 40 Fed. Reg. 24,134.

each school was being given the discretion to measure those levels of interest "by a reasonable method *it deems appropriate*." 40 Fed. Reg. 24,134 (emphasis added).

By compelling each school irrebuttably to assume that its male and female students are equally interested in participating in intercollegiate athletics, rather than by letting it use any reasonable assessment method that it "deems appropriate," the First Circuit's test violates these portions of the regulations as well.

In sum, the First Circuit's decision is inconsistent with and refuted by the regulations that Secretary Weinberger issued to implement Title IX. Those rules were designed to prevent schools from affording lesser participation opportunities to interested members of one sex than to interested members of the other, not to force schools to allocate opportunities in an effort to equalize participation by men and women in any particular programs.

II. THIS CASE INVOLVES AN ISSUE OF GREAT PUBLIC IMPORTANCE THAT SHOULD BE RESOLVED WITHOUT DELAY

The ability of our educational institutions to allocate their scarce dollars so as best to provide athletic opportunities for both male and female students is a matter of great public importance. As the 1975 HEW preamble noted, "athletics sponsored by educational institutions [are] an integral part of [an] institution's education program." 40 Fed. Reg. 24,134. Moreover, the application of Title IX to athletics programs has long sparked extraordinary public interest and concern. For example, HEW's 1974 proposed regulations drew more than 9,700 written comments (see 40 Fed. Reg.

24,128), and that outpouring of interest led Secretary Weinberger to comment, only half in jest, that he "had not realized until the comment period that athletics is the single most important thing in the United States." N.Y. TIMES, June 27, 1975, at 16; see Pet. App. 10a-11a n.6.

The rule adopted by the First Circuit should be corrected without delay. As the course of this case shows, the financial burden on a school that seeks to defend its decision to allocate athletic opportunities by equally accommodating the actual interests of its male and female students -- when the relative level of interest is greater for one sex than the other -- is prohibitive. Thus, absent prompt correction by this Court, other schools are likely simply to acquiesce in the First Circuit's decision and adopt its quota-based system.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 20, 1997

Supreme Court, U.S.
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No. 96-1321

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1996

BROWN UNIVERSITY, *ET AL.*, *PETITIONERS,*

v.

AMY COHEN, *ET AL.*, *RESPONDENTS.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

This case arises out of Brown University's May 1991 decision to stop funding two thriving women's intercollegiate athletic teams -- women's gymnastics and volleyball -- when the university already offered "far more individual positions for male athletes than for female athletes." App. 86a, 89a. Brown also announced that it was terminating funding for two men's teams -- golf and water polo. *Id.* The teams would be allowed to continue only if they could raise all of their funds from private sources. App. 207a. The women's teams would have to raise over $62,000 annually to survive; the men's teams had to raise less than $16,000. *Id.* As a result, Brown knew "full well" that the women's teams (unlike the men's teams) would be unable to continue. 232a.

In April 1992, members of the women's gymnastics and volleyball teams filed this class action lawsuit against Brown University, its President, and its Athletic Director (collectively "Brown"), charging that Brown's intercollegiate athletic program discriminates against women in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.*, App. 252a ("Title IX").[1] The certified class consists of "all present and future Brown University women students and potential students who participate, seek to participate, and/or are deterred from participating in intercollegiate athletics funded by Brown." App. 202a-203a. Plaintiffs sought, *inter alia*, both preliminary and final injunctive relief ensuring women equality of opportunity and treatment in Brown's intercollegiate athletic program.

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[1] Title IX provides, in pertinent part: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. §1681(a), App. 252a.

Cohen I. On December 22, 1992, after a three-week hearing, the district court granted plaintiffs' motion for a preliminary injunction. *Cohen v. Brown University*, 809 F. Supp. 978 (D.R.I 1992) (*"Cohen I"*), App. 202a. In its lengthy opinion and order, the district court first explored the history of intercollegiate athletics at Brown University. It noted that Brown had developed and supported men's teams for over 100 years, but had created virtually all of its women's teams between 1971 and 1977, immediately before and after Title IX was enacted. App.206a.

The court then reviewed the applicable law, including both the relevant federal regulations applying Title IX to intercollegiate athletics, 34 C.F.R. §§ 106.41 *et seq.*, App. 259a ("Title IX regulations"), and the federal government's official *Policy Interpretation* of Title IX and the Title IX regulations. 44 Fed. Reg. 71,413 (1979), App. 261a.[2] It focused on plaintiffs' claim that Brown was in violation of section 106.41(c)(1) of the Title IX regulations, which addresses "[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of both sexes." To determine whether Brown was in violation of section 106.41(c)(1), the district court applied the three-part test for compliance with that section set forth in the *Policy Interpretation*, which asks:

> (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or

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[2] The Title IX regulations and *Policy Interpretation* were originally promulgated by the Department of Health, Education and Welfare pursuant to an explicit grant of authority from Congress. *See* App. 176a. Since that time, responsibility for enforcing Title IX has devolved to the Department of Education (DOE). For convenience, and following the convention in the lower courts, App. 10a n.6, 175a-176a, we refer to DOE as the agency responsible for enforcing Title IX.

> (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
>
> (3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

App. 282a. An institution that satisfies *any one* of the three questions is in compliance with this component of the Title IX regulations. *Id.*

Reviewing the evidence in detail, the district court concluded that "plaintiffs have shown a likelihood of success with respect to § 106.41(c)(1) based on Brown's likely violation of the three-part test." App 234a. Specifically, the court found Brown in likely violation of Part One of the three-part test because the ratio of men to women in Brown's intercollegiate athletic program (63.4% men to 36.6% women) was not "substantially proportionate" to the ratio of men to women in Brown's student body (51.8% men to 48.2% women). App. 228a. Regarding Part Two, it found that Brown did not have a "continuing practice of program expansion demonstrably responsive to the developing interests and abilities of the [underrepresented] sex" because, among other reasons, "the only women's team added since 1977 was winter track in 1982, a sport that merely involved providing indoor space to the existing women's track team." *Id.* Finally, the district court found Brown in likely violation of Part Three of the test (requiring the school's present program to "fully and effectively accommodate" the interests and abilities of the underrepresented gender) because

of its decision to stop funding women's gymnastics and volleyball -- two successful women's teams for which there were ample interest and ability. App. 229a. As a result of the loss of university funding, each team was "struggling not only to remain active in varsity-level competition at Brown, but also to survive as a team at all." App. 230a.-231a.[3]

After weighing other relevant factors, the district court granted the preliminary injunction. It reinstated the two women's teams and prohibited Brown from reducing the funding or status of any other women's university-funded varsity team pending trial. App. 249a.[4]

Cohen II. On appeal, the First Circuit unanimously affirmed. *Cohen v. Brown University*, 991 F.2d 888 (1st Cir. 1993) (*"Cohen II"*), App. 167a. At the outset, the court rejected Brown's argument that the three-part test violates 20 U.S.C. § 1681(b) because it (supposedly) mandates strict numerical parity between the gender balance of a college's athletic program and the gender balance of its student body.[5] The court found that

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[3] The district court also noted that "some evidence" suggested that other women's teams not funded by Brown "have been, and continue to be, qualified to compete" at the highest varsity level, but said that, "[a]t this preliminary stage, I am not in a position to rule on the varsity capabilities of other teams." App. 230a.

[4] The district court declined to rule on plaintiffs' claim that Brown was also in violation of sections 106.41(c)(2)-(10) of the Title IX regulations, which require equal treatment of athletes. Although the court observed that "plaintiffs have presented some compelling facts on the differences in treatment between men's and women's teams...indicat[ing] substantial inequalities between the sexes in the areas of funding, publicity and recruitment," App. 224a, it deferred ruling on these claimed violations until trial, based upon its view that a violation of §106.41(c)(1) alone would support a finding of liability under Title IX. *Id.* Brown does not contest that view here.

[5] Section 1681(b) provides: "Nothing contained in [20 U.S.C. § 1681(a), *see* footnote 1 *supra,*] "shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or

the three-part test is fully consistent with § 1681(b) because it does *not* mandate gender parity; to the contrary, it allows universities to comply with Title IX by satisfying Part Two of the test (continuing program expansion) or Part Three (full and effective accommodation), whether or not they have satisfied Part One (gender parity). App. 174a-175a.

The First Circuit then rejected Brown's contention that the three-part test "countervails the enabling legislation" because it compares men's and women's athletic participation ratios to their ratios in the student body, rather than to their ratios in some hypothetical population of those with sufficient interest and ability to participate in intercollegiate athletics. App. 183a-184a. In regard to the law, the First Circuit held that DOE's *Policy Interpretation* is entitled to "appreciable deference" under *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984), as a "plausible" reading of Title IX that "draws its essence from the statute." App. 176a, 184a-185a. It then added, "As it happens, Brown's view is also poor policy for, in the long run, a rule such as Brown advances would likely make it more difficult for colleges to ensure that they have complied with Title IX." App. 185a. Instead of the "relatively simple assessment of whether there is unmet need in the underrepresented gender that rises to a level sufficient to warrant a new team or the upgrading of an existing team," Brown's argument would require "[s]tudent plaintiffs...as well as universities monitoring self-compliance, ... to assess the level of interest in both the male and female student populations and determine comparatively how completely the university was serving the interests of each sex." App. 186a. The court also

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percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: *Provided*, that this subsection shall not be construed to prevent the consideration...of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex." App. 255a.

observed: "Brown's theory invites thorny questions as to the appropriate survey population, whether from the university, typical feeder schools, or the regional community. [It] would do little more than overcomplicate an already complex equation." *Id.*

The First Circuit similarly rejected Brown's argument that the three-part test violates the Fifth Amendment's equal protection clause and/or requires "affirmative action." It noted that Brown's argument rested on the factually unsupported premise that men are inherently more interested than women in sports, and said:

> Brown points to no evidence in the record that men are any more likely to engage in athletics than women, absent socialization and disparate opportunities." In the absence of any proof supporting Brown's claim, and in view of congressional and administrative urging that women, given the opportunity, will naturally participate in athletics in numbers equal to men, we do not find that the regulation . . . offends the Fifth Amendment.[6]

App. 187a. Finally, the court concluded that the regulation would not transgress the Fifth Amendment, "even if we were to assume, for argument's sake, that the regulation creates a gender classification slanted somewhat in favor of women," because it fulfills a permissible purpose of remedying past discrimination against women. App. 187a-188a.

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[6] Brown's petition recites language from this quote out of context and says the First Circuit created an "irrebuttable presumption" that "women, given the opportunity, will naturally participate in athletes in numbers equal to men." Pet. at 2. That simply is not so.

Cohen III. On remand, after a lengthy trial,[7] the district court found Brown in violation of Title IX and its regulations on two independent grounds. *Cohen v. Brown University*, 879 F. Supp. 185 (D.R.I. 1995) ("*Cohen III*"), App. 85a. First, the district court ruled that Brown failed to satisfy all three parts of the three-part test and was, therefore, in violation of § 106.41(c)(1), governing equal opportunities to participate. App. 114a-144a. Second, the district court ruled that the allocation of offerings by gender within the "unusual two-tiered structure" of Brown's intercollegiate athletic program violates the "equal treatment" portions of the Title IX regulations, § 106.41(c)(2)-(10). App. 144a.

Part One. The district court first held that Brown fails Part One of the three-part test (substantial proportionality) because women are provided with only 38% of the opportunities to participate, when their undergraduate enrollment rate is 51%. App. 98a. In so doing, the district court specifically found that the reason for this disparity is that Brown offers "far more individual positions for male athletes than for female athletes" and "predetermines the number of athletic positions available to each gender" through a variety of practices, including "the practice at Brown to rely almost exclusively on recruited athletes to field varsity teams." App. 89a, 119a-121a n.35.

Part Two. The district court next held that Brown fails Part Two of the three-part test (continuing program expansion) because Brown's history of program expansion for women essentially started and ended in the 1970s. App. 140a. With the exception of 1982, when Brown added an indoor track season for women that it already provided for men, Brown ignored

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[7] Evidence from the 1992 preliminary injunction hearing was incorporated as part of the evidence at trial in 1994. Between the two hearings, the district court heard over 40 days of evidence. At the beginning of trial, Brown restored women's volleyball to funded-varsity status and the parties agreed to a partial settlement, resolving some of the plaintiffs' claims about unequal treatment. App. 96a n.17, 98a.

(women's water polo, skiing), rejected (women's fencing), or outright interfered with (women's gymnastics and volleyball) both the developing and established interests and abilities of women to participate in intercollegiate athletics. App. 88a-98a, 140a. Brown took these actions to save money.

Part Three. The district court then held that Brown fails Part Three of the three-part test (full and effective accommodation) because women with the highest caliber of interest and ability in gymnastics, fencing, skiing, and water polo are not being fully and effectively accommodated in Brown's present program. The district court made its findings in the context of the "unique" and "unusual two-tiered structure of Brown's intercollegiate athletic program." App. 88a, 143a. The school fields both university-funded varsity teams, for which Brown "provides the financial resources to sustain the budgets," and donor-funded varsity teams, which must raise their own funds to exist. App. 90a. "A consequence of this two-tiered system is that most donor-funded varsities have found it difficult to maintain a level of competitiveness as high as their ability would otherwise permit." *Id.* "[T]he burden of [donor-funded] status falls more heavily on women's teams...[which] are less able than men's teams to raise necessary funds from private donations." App. 116a n.30. The district court found that two women's teams, gymnastics and water polo, could not compete at all at the varsity level "if denied university-funded status." App. 142a.

Brown's "Qualified Pool" Argument and Evidence. In applying the three-part test, the district court also addressed and rebuffed Brown's argument that a Title VII "qualified pool" analysis should be utilized and that Brown's superior offerings to men are justified because men are simply more interested in participating in intercollegiate athletics than women. App. 123a-131a. As a legal matter, the district court found Brown's analogy to Title VII "qualified applicant pools" inapposite.

"Title VII," it said, "seeks to determine whether gender-neutral job openings have been filled without regard to gender. Title IX, on the other hand, was designed to address the reality that sports teams, unlike the vast majority of jobs, *do* have official gender requirements." App. 126a (emphasis in original).

Even more important, for the purposes of this review, the district court also rejected Brown's "qualified pool" argument *based on the evidence introduced at trial* as "meaningless since it is an impossible task to quantify latent and changing interests." App. 127a (footnote omitted). The court relied upon Brown's own expert, Dr. Finis Welch, in concluding that Brown's "evidence" failed to establish an accurate or ascertainable "qualified applicant pool" and did not "account for the extent to which opportunities drive interests." App. 130a.[8] The district court also faulted, on evidentiary grounds, Brown's reliance on data from matriculated students, based upon its finding that Brown predetermines the students on campus by its selection of teams and its recruiting practices. App. 128a. And it dismissed Brown's reliance on data from Brown applicants, based upon its finding that expressions of interest on Brown's admissions application did not "provide a reliable measure of interest that

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[8] Brown's continued reliance on Dr. Welch's testimony, Pet. at 7, is particularly misplaced, since the district court cited Dr. Welch's testimony to *support* its rulings and Dr. Welch's testimony in favor of Brown was completely discredited at trial. For example, Dr. Welch, who had never conducted any similar study in the past, admitted that he drew directly opposite conclusions about men and women's behavior from the same information. He also insisted that his data demonstrated that there are not enough women at Brown to field a women's water polo team, despite his knowledge that such a team has existed for years. (Tr. 11/30/94 at 148-150; 12/1/94 at 64) Plaintiffs' rebuttal expert, Dr. Donald Sabo, an expert in the fields of sports sociology, research methodology, and gender studies, testified that "the methodological flaws in the report are substantive enough that I would not come to any conclusion regarding participation or interest based on the Welch report." (Tr. 12/6/94 at 161)

will be acted upon given the opportunity." App. 129a (footnote omitted).[9]

Alternative Basis for Liability. In addition to finding Brown in violation of the three-part test, the district court found Brown in violation of Title IX on a second, independent ground because of the way in which the "program offerings" at Brown are "allocated by gender within the two-tiered structure":

> [F]ar more male athletes are being supported at the university-funded varsity level than are female athletes, and thus, women receive less benefit from their intercollegiate varsity program as a whole than do men from their intercollegiate varsity program as a whole. This inequity is a consequence of the qualitative differences between the benefits enjoyed by university and donor-funded varsity teams.

App. 144a. As a consequence, it held Brown liable for violating the "equal treatment" components of the Title IX regulations, 34 C.F.R. §§ 106.41(c)(2)-(10). App. 144a-145a.

Remedial Order of August 17, 1995. In July 1995, Brown submitted a proposed compliance plan in which it proposed to reach "substantial proportionality" under Part One of the three-part test by capping the size of men's teams, increasing the size of women's teams, and creating several junior varsity teams for women. App. 157a. The district court rejected Brown's proposal as "fatally flawed" and neither comprehensive nor a good faith effort. App. 157a-161a. It then noted that, in order to meet Part One by eliminating men's teams (the course

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[9] Brown's assertion, Pet. at 1, that the court "refused to consider" its "overwhelming evidence" on relative interests is, therefore, simply false. To the contrary, as the above reflects, the district court specifically considered and rejected Brown's "evidence." Moreover, the First Circuit, in affirming the district court's findings, rejected Brown's "relative interest" argument as "unproven." App. 39a.

Brown proposed to take next), Brown would need to "eradicate approximately 213 men's varsity positions." App. 163a. Declining to take that approach, the district court ordered Brown instead to meet Part Three of the test by "upgrading the positions of approximately 40 women" -- the women participating in gymnastics, fencing, water polo, and skiing. *Id.* That change would have increased the percentage of women among Brown's varsity athletes to 39.1%.

Cohen IV. Brown again appealed to the First Circuit, broadly attacking the three-part test, the district court's application of the three-part test, evidentiary rulings, and the trial court's rejection of Brown's proposed plan for compliance.[10] After the full court denied Brown's request that the appeal be heard en banc, a new panel of the First Circuit heard the appeal, and, with one judge dissenting, affirmed the district court's judgment on liability and rejection of Brown's proposed compliance plan, but reversed the district court's order of relief, remanding to give Brown another opportunity to present its own proposal for compliance. *Cohen v. Brown University*, 101 F.3d 155 (1st Cir. 1996) ("*Cohen IV*"), App. 1a.[11]

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[10] Brown did not, however, substantively challenge the district court's alternative basis for liability, violation of the "equal treatment" components of the athletics regulations, §106.41(c)(2)-(10). On appeal, plaintiffs argued that argument had been waived and that the judgment should be affirmed, without further examination, on this independent ground. The First Circuit did not address the issue in its decision.

[11] In January 1996, while the appeal was pending, DOE responded "to requests for specific guidance about the existing standards that have guided the enforcement of Title IX in the area of intercollegiate athletics" by issuing a "Clarification" of the three-part test, explaining how the test would be applied in a variety of circumstances. App. 294a. Contrary to Brown's assertion that DOE "changed course," Pet. at 5, DOE expressly rejected suggestions that it alter the three-part test. DOE's Office for Civil Rights ("OCR") explained: "[I]t would not be appropriate to revise the 1979 Policy Interpretation, and adherence to its provisions shaped OCR's consideration of these comments. The Policy Interpretation has guided OCR's enforcement in the area of athletics for over fifteen years, enjoying the bipartisan support of Congress. The Policy

The First Circuit found "no error in the district court's factual findings or in its interpretation and application of the law." App. 4a. Contrary to Brown's fundamental premise here -- that the record below demonstrates that men substantially outnumber women among prospective and current students interested in varsity athletic participation, Pet. at 7 -- the majority rejected Brown's contention as "unproven," App. 39a, and affirmed the district court's finding, as a factual matter, that Brown failed to prove that the "full and effective accommodation of the interests and abilities of Brown's female students would disadvantage Brown's male students." App. 8a.

The First Circuit revisited the legislative and regulatory history of Title IX, as well as precedent cited by Brown, and concluded that there was no reason to depart from the First Circuit's authoritative interpretation in *Cohen II*, which had since been followed by every circuit court to address the issue. App. 26a (citations omitted). Like the district court before it, the First Circuit rejected Brown's claim that the three-part test turns Title IX into an "affirmative action" statute mandating quotas in favor of women. It said: "[N]otwithstanding Brown's persistent invocation of the inflammatory terms 'affirmative action,' 'preference,' and 'quota,' this is not an affirmative action case." App. 20a. "No aspect of the Title IX regime at issue in this case -- inclusive of the statute, the relevant regulation, and the pertinent agency documents -- mandates gender-based preferences or quotas, or specific timetables for implementing numerical goals." App. 22a. The First Circuit also rejected Brown's characterization of the three-part test as creating an "irrebuttable presumption" that absence of statistical parity violates Title IX, saying that "the question of substantial proportionality" in the three-part test "is merely the starting point for analysis, rather than the conclusion; a rebuttable presumption, rather than an inflexible requirement." App. 23a.

Interpretation has also enjoyed the support of every court that has addressed issues of Title IX athletics." App. 295a.

Although questioning the applicability of § 1681(b) at all to the inquiry, App. 31a, the First Circuit again confirmed, following *Cohen II*, that the three-part test, both on its face and as applied by the district court, is fully consistent with § 1681(b) because the three-part test does not require statistical balancing. App. 32a-33a. The court also again rejected Brown's reliance upon Title VII "qualified pool" analysis. "[T]he Title VII concept of the 'qualified pool' has no place in a Title IX analysis of equal opportunities for male and female athletes," it said, "because women are not 'qualified' to compete for positions on men's teams, and vice-versa." App. 37a.[12] In addition, the First Circuit again rebuffed Brown's "relative interests" approach as both contrary to the remedial purposes of the statute and devoid of evidentiary support. App. 39a, 42a. It said: "We emphasize that, on the facts of this case, Brown's lack-of-interest arguments are of no consequence." App. 42a-43a. Finally, the First Circuit rejected Brown's equal protection argument, concluding that both the statutory scheme and the district court's remedial order satisfied the intermediate level of scrutiny accorded to gender-based classifications, "even assuming that the three-part test creates a gender classification that favors women." App. 52a.[13]

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[12] The court explained: "Brown's approach fails to recognize that, because gender-segregated teams are the norm in intercollegiate athletics programs, athletics differs from admissions and employment in analytically material ways . . .. [I]n the athletics context, gender is not an irrelevant characteristic. Courts and institutions must have some way of determining whether an institution complies with the mandate of Title IX and its supporting regulations to provide equal athletics opportunities for both genders, despite the fact that the institution maintains single-sex teams, and some way of fashioning a remedy upon a determination that the institution does not equally and effectively accommodate the interests and abilities of both genders." App. 37a-38a.

[13] In view of its rejection of Brown's equal protection challenge, the First Circuit reserved, without deciding, plaintiffs' arguments that Brown had waived the constitutional issue by failing to present it to the district court and that Brown lacks standing to assert the claimed interests of its male students. App. 45a n.17.

REASONS FOR DENYING THE WRIT

I. BROWN IS SEEKING AN ADVISORY OPINION.

For more than 200 years, this Court has held that it "is without power to give advisory opinions." *E.g., Alabama State Fed'n of Labor v. McAdory*, 325 U.S. 450, 461 (1945) (quoting *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792)); *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) ("federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them"). In this case, Brown is seeking such an opinion -- both because the Questions Presented are not raised in this case and because the district court held Brown liable on two independent grounds, only one of which Brown appealed.

A. Neither the Decision Below nor the Record Raises the Questions Presented in the Petition.

All three of the Questions Presented in the petition suffer from the same defect: they contain factual predicates that do not exist in this case. The first Question Presented asks whether liability can be found under certain circumstances against "a university that seeks to offer varsity teams that will accommodate the athletic interests of qualified men and women equally effectively." Pet. at (i). No such university is present in this case. In other words, Brown's assertions in the petition -- that Brown "attempted to design its sports selection in a way that could give men and women an equal chance to participate in athletics" and does not "seek to engineer the gender composition of its program," Pet. at 6 -- are simply false. The district court specifically found that Brown offers "far more individual positions for male athletes than for female athletes," purposefully recruits men and women to fill those positions without regard to others' interests and abilities, and thereby "predetermine[s] the gender balance of its athletic program." App. 89a, 119a-121a n.35. Moreover, Brown is now seeking to *eliminate* teams of qualified women athletes.

The second Question Presented asks whether 20 U.S.C. § 1681(b) prohibits the adoption of "standards governing liability that effectively require universities . . . to make the gender ratio of the varsity athletic program conform to the gender ratio of the student body." Pet at (i). But no such standards are present here. To the contrary, the First Circuit made it abundantly clear that Brown's program would have complied with Title IX if it satisfied *either* the second part of the three-part test (continuing expansion responsive to women's developing interests and abilities) *or* the third part of that test (full and effective accommodation of women's interests and abilities) -- regardless of whether Brown had achieved "gender parity between its student body and its athletic lineup." Pet at 2. It even noted that Brown was "distorting the three-part test by reducing it to . . . a one-part test for strict liability." App. 33a. Moreover, the district court specifically found that Brown could comply with the third part of the test (full and effective accommodation) just by "upgrading the positions of approximately 40 women." App. 142a-43a, 163a. If Brown had taken that course of action, it would now be in compliance with Title IX even though only 39.1% of its athletes would be women.[14]

Finally, the third Question Presented asks whether an interpretation of Title IX that "effectively requires universities . . . to grant preferential treatment to women in order to redress real or perceived societal discrimination" would raise serious questions under the equal protection clause. Pet at (i). No such interpretation is present in this case. The three-part test is, by its terms, gender-neutral. It applies as forcefully to men at Vassar as to women at Brown. Moreover, it does not require

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[14] Despite these facts, Brown asserts in its petition that the First Circuit held it liable "because its athletic program did not produce gender parity between its student body and its athletic lineup" and that "the only feasible way that Brown could have complied with Title IX, as interpreted by the First Circuit, would have been to adopt a gender conscious program, based on a numerical quota, to set aside up to 51% of its varsity athletes." Pet. at 2. Those assertions are false.

universities to grant "preferential treatment" to anyone in order to redress "societal discrimination." Rather, it requires universities to "effectively accommodate the interests and abilities of members of both sexes," 34 C.F.R. § 106.41(c)(1), and redresses "a duly adjudicated determination that specific defendants had discriminated against a certified class of women in violation of a federal anti-discrimination statute; based on findings of fact that were subject to the Rules of Evidence." App. 25a.

Because the factual predicates for the Questions Presented are not present in this case, any ruling on them would constitute an advisory opinion. Moreover, no other questions can properly be raised at this time. *See* S. Ct. Rule 14.1(a) ("[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court"); *United States v. Williams*, 504 U.S. 36, 40-45 (1992); *see also* Stern, Gressman, Shapiro & Geller, SUPREME COURT PRACTICE 348 (7th ed. 1993) ("normally the Court will not consider points or questions not raised below *and* in the petition") (emphasis in original). For this reason alone, the petition should be denied.

B. The District Court Found Brown in Violation of Title IX on Two Independent Grounds, Only One of Which Brown Appealed.

The second reason why any decision in this case would constitute an advisory opinion is that Brown was held liable below on two independent grounds, only one of which Brown appealed. In *United States v. Hastings*, 296 U.S. 188, 193-94 (1935), this Court held that it should not review a federal district court's decision based on two independent grounds, one of which had not been presented for review, saying: "If the judgment is independently based, and in that respect is not open to correction or reversal, we are of the opinion that this Court should not entertain the . . . appeal."

The same principle applies in this case. Here, the district court found Brown liable under Title IX on two independent grounds: (1) failure to provide equal opportunity to participate and (2) failure to provide equal treatment. App. 144a. Brown did not appeal the district court's second, independent ground for finding it liable. As a result, Brown waived any possible challenge to this holding.[15]

The First Circuit did not separately address the district court's independent, alternative ground for holding Brown liable. Nor does Brown challenge the district court's independent basis for liability here.[16] That being so, in this case, as in *Hastings*, any opinion by this Court on the issues raised in the petition would be advisory. Whatever views the Court might express on those issues, the judgment of the district court would remain in effect. Accordingly, the rule articulated in *Hastings* applies here: because the ruling below is "independently based" on a ground that has not been appealed "and in that respect is not open to correction or reversal," this Court "should not entertain the appeal."

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[15] In Brown's opening brief to the First Circuit, the sole reference to this holding was a throw-away line, contained in a laundry list of errors on page 64 of Brown's 65-page brief. This was plainly insufficient in light of the First Circuit settled appellate rule that "issues adverted to in a perfunctory manner, unaccompanied by some developed argumentation, are deemed waived." *Cohen II*, App. 192a (quoting *Ryan v. Royal Ins. Co.*, 916 F.2d 731, 734 (1st Cir. 1990)). Moreover, Brown's attempt to revive the issue in its reply brief was unavailing. "It is well settled in this court, for good reason which need not be rehearsed here, that a legal argument made for the first time in an appellant's reply brief comes too late and need not be addressed. [Such an argument] is waived on appeal." *Rivera-Muriente v. Agosto-Alicea*, 959 F.2d 349, 354 (1st Cir. 1992).

[16] None of the Questions Presented addresses the district court's independent basis for finding Brown liable. Pet. at (i). The petition does, however, mischaracterize the district court's holding in a footnote and incorrectly states that "this finding is also based on Brown's failure to meet the quota that is at the heart of this case." Pet. at 12 n.8.

II. AS BROWN ADMITS, THERE IS NO CONFLICT AMONG THE COURTS OF APPEALS REGARDING THE FIRST CIRCUIT'S INTERPRETATION OF TITLE IX.

Review should also be denied because the nation's appellate courts uniformly agree with the First Circuit's interpretation of Title IX. Since the First Circuit issued its decision in *Cohen II*, App. 167a, every circuit court of appeals to address the issue has endorsed the analysis of Title IX applied in this case. *See Horner* v. *Kentucky High Sch. Athletics Ass'n*, 43 F.3d 265 (6th Cir. 1994); *Kelley* v. *Board of Trustees*, 35 F.3d 265 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 938 (1995); *Favia* v. *Indiana Univ. of Pa.*, 7 F.3d 332 (3d Cir. 1993); *Roberts* v. *Colorado State Bd. of Agric.*, 998 F.2d 824 (10th Cir.), *cert. denied*, 510 U.S. 1004 (1993). Thus, the Third, Sixth, Seventh, and Tenth Circuits are in agreement with the First Circuit's interpretation of the law and relevant agency documents. *No* court of appeals has disagreed with the First Circuit's watershed analysis.

The unanimity among the circuits is not surprising, since the courts' approach is based directly on DOE's three-part test for compliance with Title IX. In *Cohen II*, which was the first court of appeals decision applying Title IX to intercollegiate athletics, the First Circuit held that the three-part test was entitled to substantial deference as the authoritative interpretation of the enforcement agency's regulations promulgated in response to express congressional delegation. App. 176a. Every other court of appeals to consider the issue since *Cohen II* has agreed that the Department's test should be accorded substantial deference. Then, in *Cohen IV*, the First Circuit revisited the question of whether the three-part test is entitled to deference, and concluded -- once again -- that the agency's interpretation of Title IX "deserves controlling weight." App. 27a-28a. In an *amicus* brief filed in *Cohen IV*, the United States confirmed that the First Circuit's interpretation of the three-part test is correct, and that Brown should be held liable for its failure to comply with Title IX. Thus, not only are all the circuit courts of appeals

in agreement on the issues presented in this case, but the approach they have followed was dictated by the federal agency authorized to interpret and implement Title IX. It is hard to imagine a case where review is *less* warranted than the circumstances presented here.

Ironically, and implicitly acknowledging the force and persuasiveness of the First Circuit's decisions, Brown goes so far as to *argue* (as if it were a point in favor of Supreme Court review) that the Court should not wait until there is a conflict among the circuits because "there is essentially no prospect" that another circuit will depart from this uniform precedent. Pet. at 29. *See also id.* at 17 (conceding "the uniform position of the circuits and the federal agency responsible for enforcement" of Title IX). This, however, is a reason for *denying* the petition -- not for granting it.

III. CONTRARY TO BROWN'S CLAIM, THE DECISION BELOW DOES NOT CONFLICT WITH ANY OF THIS COURT'S PRECEDENTS.

In an effort to conjure up a basis for Supreme Court review in the face of appellate unanimity on the meaning of Title IX, Brown claims that the decision below conflicts with various precedents of this Court regarding Title VII and equal protection. These arguments are without merit.

A. The Decision Below Does Not Conflict With This Court's Decisions Regarding the Proper Approach to Proving Discrimination in Title VII Cases.

Brown's main argument is that the First Circuit "committed virtually every error that this Court has warned against when interpreting the same statutory wording at issue here in the context of Title VII." Pet. at 16. On this point, Brown first claims that the lower court's approach conflicts with this Court's Title VII precedents -- including, in particular, *Wards Cove v. Atonio*, 490 U.S. 642 (1989) -- by "allow[ing] an inference of

discrimination based on a statistical comparison with the student body, instead of the qualified pool of athletes seeking to play varsity sports." Pet. at 16. In Brown's view, the statistical disparity between female athletic participation and female student enrollment at Brown "was the product of differences in men's and women's relative interest in sports, for which Brown has no legal responsibility." *Id.* The proper approach, says Brown, is to compare the *interested* potential varsity athlete pool, however defined, to the make-up of Brown's athletic program, rather than to compare student enrollment and the athletic program. Any other approach, claims Brown, flies in the face of this Court's teachings under Title VII.

This argument manufactures a conflict where none exists. First, as the lower courts found, Title VII's approach to proving discrimination in employment, where men and women compete for the same jobs, makes no sense in the context of intercollegiate athletics, where schools are permitted to create sex-segregated sports programs. Under Title VII, the relevant statistical comparison for proving discrimination is between the percentage of women or minorities in the employer's labor force and the percentage of that same group in the qualified labor market, *Hazelwood School District v. United States*, 433 U.S. 299, 308 (1977), or, where reliable employment statistics do not exist, the composition of "otherwise-qualified applicants" for at-issue jobs. *Wards Cove*, 490 U.S. at 651. In such cases, statistics are used to show that the denial of jobs or employment benefits to women or minorities is not random, but rather is the result of purposeful discrimination.

The role of statistics in proving denial of equal athletic opportunity under Title IX, on the other hand, is entirely different. In an intercollegiate athletics program that operates separate teams for men and women, the percentage of women participating in athletics is never the result of chance; rather, it is the deliberate result of the number and size of women's and men's teams that the university chooses to sponsor. Accordingly, the purpose of statistical proof in a Title IX

athletics case charging discrimination against women is not to rule out the possibility that the disparity between the percentage of women athletes and women students is random; we already know that it is not. Rather, the purpose is to show that an institution's female students have disproportionately fewer opportunities to participate in athletics than male students at the same institution. Under Title IX's three-part test, such a disparity is unlawful unless the institution demonstrates a history of continuing program expansion in women's athletics (Part Two) or that the interests and abilities of its female students are already fully and effectively accommodated by the present program (Part Three). Thus, Brown's claim that the lower court's approach -- which compared female athletic participation to female student enrollment at Brown -- conflicts with cases under Title VII is meritless; the two statutes are simply not comparable on this point.

Second, as a factual matter, Title VII's "qualified pool" approach is inapplicable in the Title IX context because, as Brown discovered, it is virtually impossible to identify any workable "pool" from which the relevant statistical comparison could be drawn. During the trial, for example, Brown argued that the "qualified applicant pool" for Title IX purposes could be defined in a variety of ways, including matriculated students, all actual Brown applicants, or all academically able potential varsity participants. *See* App. 126a-130a. The district court found, however, that "[e]ach of the possible 'pools' from which Brown might draw varsity athletes has inherent theoretical and practical problems as a survey population." App. 128a. Thus, for example, Brown's attempt to use the group of matriculated students as the relevant pool was rejected for the simple reason that "[w]hat students are present on campus to participate in a survey of interests has already been predetermined through the recruiting practices of the coaches." *Id.* The district court went on to reject Brown's other proposed "pools" as unduly restrictive of developing interests and/or unduly influenced by Brown's offerings and selection practices. App. 126a-130a. Thus, unlike the Title VII context, where the relevant "pool" consists of the

qualified labor market, no comparable measure exists with respect to interested student athletes. Brown's attempt to equate the two statutes and thereby manufacture a conflict warranting this Court's review is groundless and should be rejected.

B. The Decision Below Does Not Conflict With This Court's Decisions Interpreting Title VII to Prohibit Quotas.

Brown's second argument is that the First Circuit's "conclusion that [Title IX] obligates universities to afford preferential treatment to women conflicts with the Court's interpretation of the same language in Title VII." Pet. at 20 (capitalization omitted). On this point, Brown begins by quoting section 1681(b) of Title IX, which essentially provides that Title IX should not be interpreted to "require any educational institution to grant preferential or disparate treatment to the members of one sex on account of" a statistical disparity. *See* footnote 5, *supra*. Brown next states that section 1681(b) was "patterned after Section 703(j) of Title VII" (Pet. at 21 n.15), which, in turn, has been interpreted by this Court as prohibiting the adoption of evidentiary standards that require defendants to institute quotas. Brown then opines that the First Circuit's decision is tantamount to a quota in favor of women, since Brown is being "compell[ed] . . . to reserve up to 51% of its athletic opportunities for some 40% of the pool of qualified athletes." Pet. at 21. Such a "quota," Brown proclaims, is in direct conflict with this Court's Title VII jurisprudence -- *ergo*, review is warranted.[17]

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[17] As a threshold matter, we note that Section 1681(b) is not applicable here. As the First Circuit found, the legislative history preceding the adoption of that provision makes clear that it was "specifically designed to prohibit quotas in university admissions and hiring . . . and does not refer to an imbalance *within the university*, with respect to the representation of each gender in intercollegiate athletics, as compared to the gender makeup of the student body." *Cohen IV*, App. 31a. For purposes of the following discussion, however, we assume *arguendo* that Section 1681(b) is applicable to intercollegiate athletics.

The most basic problem with this argument is that it has nothing to do with the facts of this case. As explained above, there is nothing in the First Circuit's decision -- or, for that matter, DOE's three-part test -- that "compels" or "requires" Brown to reserve 51% of its athletic opportunities for women. To the contrary, while substantial proportionality is a "safe harbor" under Part One, Brown could also have satisfied Title IX by showing *either* a "continuing practice of program expansion" for women athletes (Part Two) *or* that the university was "fully and effectively accommodating" the needs of interested and able female athletes (Part Three). Proof on either point would have absolved Brown of liability under Title IX without regard to the percentage of women actually competing in its athletic program. *See* App. 32a ("the three-part test is, on its face, entirely consistent with § 1681(b) because the test does not *require* preferential or disparate treatment for either gender. Neither the Policy Interpretation's three-part test, nor the district court's interpretation of it, *mandates* statistical balancing; '[r]ather, the policy interpretation merely creates a presumption that a school is in compliance with Title IX and the applicable regulation when it achieves such a statistical balance.'") (emphasis in original) (quoting *Kelley*, 35 F.3d at 271). Thus, Brown's claim that the First Circuit's decision "compelled" it to achieve statistical parity under Part One of the three-part test is sophistry. For this reason alone, none of the Title VII cases cited by Brown on the quota point is relevant here -- and the conflict claimed by Brown is a figment of its own imagination.[18]

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[18] Brown also argues that, even if the three-part test does not *require* statistical parity, it still conflicts with this Court's Title VII jurisprudence because it "encourage[s] the imposition of preferential quotas." Pet. at 21. This argument misstates the law. In reality, this Court has never held that Title VII, as Brown claims, "prohibit[s] the adoption of evidentiary standards that encourage defendants to institute quotas on a voluntary basis." Pet. at 21 (footnote omitted). Thus, for example, in *Wards Cove*, this Court did not outlaw evidentiary standards that would encourage quotas; rather, it merely rejected an approach that would, as a practical matter, have meant that the "*only practicable option* for many employers would be to adopt racial quotas . . ." 490 U.S. at 652 (emphasis added). The same is true in *Watson v. Forth Worth*

Moreover, even if the First Circuit's decision could be construed as requiring an institution to reach statistical parity under Part One (which it cannot), the decision still would not impose a "quota" as that term is used in the Title VII context. The proportionality test of Part One reflects an aspect of intercollegiate athletics that not only is virtually unique among activities covered by Title IX, but also has no parallel in the Title VII employment context: in intercollegiate athletics, sex-segregated programs are the norm. Because intercollegiate athletic programs operate separate teams for men and women, any determination of nondiscrimination must, by definition, compare the participation opportunities provided for men with those provided for women. This does not amount to giving either sex a "quota" or "preference"; it merely provides for the nondiscriminatory allocation of athletic opportunities and resources between the sexes. Moreover, the proportionality test does not favor either men or women. Its analysis, rather, is tied to the availability of opportunities for the "underrepresented sex," which quite plausibly could mean either men or women. Accordingly, unlike the "quotas" disapproved in this Court's Title VII jurisprudence, the Title IX test is properly viewed as a neutral and non-preferential standard.

Finally, even assuming that the First Circuit's decision requires statistical parity and that Brown's analogy to Title VII law makes sense, Part One would only establish an impermissible "preference" in favor of female athletes if, as Brown claims, men are indeed inherently more interested than women in participating in intercollegiate sports. But there is no evidence that this is true. During the six-week trial of this case,

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Bank & Trust, 487 U.S. 977, 993 (1988) (plurality opinion), where this Court merely held that "legal rules leaving any class of employers with 'little choice' but to adopt such measures would be 'far from the intent of Title VII.'" *Id.* at 993 (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 449 (1975)). Thus, Brown's claim that the three-part test contravenes this Court's Title VII cases by "encouraging" preferential treatment is based on a fundamental misunderstanding of the law.

Brown struggled mightily to prove that men are innately more interested in sports than women. The district court ultimately rejected Brown's various attempts to prove this point as factually groundless, holding that "no one measure and no identifiable population adequately establish[es] relative interest . . . ." App. 136a. *See also* App. 127a nn. 43 & 44. The First Circuit affirmed this ruling in *Cohen IV*, rejecting as "unproven" Brown's assertion that the imbalance in the university's sports program "reflects, not discrimination in Brown's intercollegiate athletics program, but a lack of interest on the part of its female students that is unrelated to a lack of opportunities." App. 39a.

At bottom, then, there is no evidence in the record to support Brown's assertion -- repeated as a *mantra* throughout this litigation -- that men are inherently more interested in sports than women. This is not surprising, since Brown's theory is based on the sort of "archaic and overbroad generalizations" about women that this Court has repeatedly struck down as violative of the Equal Protection Clause. *See, e.g., Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975). As the First Circuit found, the type of statistical evidence relied on by Brown "purporting to reflect women's interest instead provides only a measure of the very discrimination that is and has been the basis for women's lack of opportunity to participate in sports." App. 41a. In any event, absent proof that women are innately less interested in athletics than men, a rule that requires athletic participation opportunities to mirror enrollment rates would not establish a "preference" in favor of *either* sex. For this reason alone, Brown's attempt to claim a conflict with Title VII law must be rejected.

C. The Decision Below Does Not Conflict With This Court's Equal Protection Jurisprudence.

In a final attempt to manufacture a conflict where none exists, Brown claims that the First Circuit's interpretation of Title IX is at odds with this Court's equal protection jurisprudence. Pet. at 24 (capitalization omitted). This argument is wrong as a matter of fact and law.

First, once again, Brown's claim presupposes that the First Circuit has "impos[ed] a mandatory quota" that discriminates against men. Pet. at 25. As explained above, however, the three-part test does not impose a quota of any sort; rather, the test is a straightforward nondiscrimination mandate in the unique context of sex-segregated athletic opportunities. In addition, Brown's theory that a quota requiring statistical balancing would discriminate against male athletes rests on its unproven (and unprovable) notion that men are innately more interested in participating in intercollegiate athletics than women. Thus, this argument fails for all the same reasons that Brown's analogy to Title VII law cannot withstand scrutiny: it has nothing to do with the facts of this case.

Even assuming, however, that the three-part test creates a gender classification that favors women, the decision below still would not run afoul of this Court's equal protection decisions. This Court has repeatedly held that a classification based on sex is permissible where it is based on a compensatory purpose and members of the benefitted sex have been historically disadvantaged. In *Mississippi Univ. for Women v. Hogan,* 458 U.S. 718, 724 (1982), this Court held that the party seeking to uphold a gender-based classification "must carry the burden of showing an 'exceedingly persuasive justification' for the classification." This burden is met "by showing that the classification serves 'important governmental objectives' and [is] . . . 'substantially related to the achievement of those objectives.'" *Id.* (citations omitted).

Brown claims that the lower court violated *Hogan* by failing to determine whether "Congress had made any findings of past discrimination that would supply an exceedingly persuasive justification" for the imposition of a quota that discriminates against men. Pet. at 25 (quoting *Hogan*, 458 U.S. at 728). Not only is this statement based on a gross mischaracterization of the facts (*i.e.*, that Title IX creates a "quota"), but it ignores the First Circuit's thorough inquiry into Title IX's legislative history in *Cohen II* – a history that reflects

pervasive discrimination against women in institutions of higher learning and "leaves little doubt that the [statute] was aimed, in part, at creating a more level playing field for female athletes." App. 173a.[19] *Cohen IV*'s ultimate rejection of Brown's equal protection claim rested in part on this prior holding regarding the congressional purposes underlying Title IX. *See* App. 46a. Thus, Brown's claim that the First Circuit failed to conduct an appropriately "searching inquiry" into the goals underlying Title IX is baseless.

Brown also argues that the decision below conflicts with *Hogan*'s admonition that a gender-based classification is unconstitutional unless "members of the gender benefitted by the classification actually suffer a disadvantage related to the classification." 458 U.S. at 729.[20] Here, Brown makes the bizarre claim that the only direct beneficiaries of Title IX are "women who already have the interest, ability, and training necessary to compete in varsity sports at the collegiate level." Pet. at 26. These women, says Brown, "managed to become accomplished athletes despite any societal discrimination"; thus, in Brown's view, a legislative classification that benefits these already-accomplished female athletes violates male athletes' right to equal protection of the law.

Brown's theory makes no sense. First, the claim that female athletes are not burdened by the denial of the *opportunity* to compete, so long as they have been able to *prepare* for

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[19] This comment referred to the legislative history accompanying enactment of the Civil Rights Restoration Act of 1987, 20 U.S.C. § 1687 (1988), which reinstated institution-wide application of Title IX in response to this Court's decision in *Grove City College v. Bell*, 465 U.S. 555, 574 (1984).

[20] In *Hogan*, the preferential treatment at issue -- the exclusion of men from a state-supported school's nursing program -- was held impermissible because the state had made no showing that women were underrepresented or disproportionately burdened in the field of nursing. *Id.* at 729. In fact, this Court noted that women have traditionally been overrepresented in the nursing profession.

competition, is silly on its face, since the two experiences are unquestionably distinct. More fundamentally, Brown's theory illogically assumes that interest and ability are unrelated to -- and will continue to exist separate and apart from -- participation opportunities. In reality, however, as the "tremendous growth in women's sports since Title IX was enacted" proves, once participation opportunities are provided, women athletes readily step forward to fill them. App. 44a. *Cf.* Costner, K., *Field of Dreams* (Universal Studios 1989) ("[I]f you build it, [they] will come.") Thus, Brown's claim that the decision below conflicts with *Hogan* and its progeny by benefitting a class of women athletes who will continue to thrive with or without Title IX is groundless. There is no basis for granting review on this point.

IV. THE DECISION BELOW DOES NOT PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW THAT WARRANTS REVIEW BY THIS COURT.

Finally, Brown argues that review is warranted because the decision below will ultimately force universities everywhere to slash men's sports programs. *See* Pet. at 28. This argument again distorts reality; in fact, *none* of the courts of appeals to apply Title IX in the context of intercollegiate athletics has required a school to cut men's sports teams. To the contrary, where a violation of Title IX is found, a school always has the option of simply increasing its women's program -- and leaving the men's athletic program intact. Schools that ignore this route and cut their men's programs instead are really scapegoating Title IX for their own failure to allocate sufficient resources to women's athletics and/or reallocate resources within their men's programs, which take up the lion's share of most universities' athletic budgets. *See, e.g.*, Brake & Catlin, *The Path of Most Resistance: The Long Road Toward Gender Equity In Intercollegiate Athletics*, 3 Duke J. of Gender Law and Policy 51, 71-72 (1996). In any event, the question of whether it is a good idea, from a social standpoint, to reallocate resources from men's to women's sports is a policy question neither presented in this case nor deserving of review -- especially in the context

of "the unusual two-tiered structure of Brown's intercollegiate athletic program." App. 88a.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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March 21, 1997

FILED
MAR 21 1997
OFFICE OF THE CLERK

No. 96-1321

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

BROWN UNIVERSITY, ET AL.,

Petitioners,

v.

AMY COHEN, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF AMICI CURIAE AMERICAN COUNCIL ON EDUCATION, AMERICAN ASSOCIATION OF STATE COLLEGES AND UNIVERSITIES, ASSOCIATION OF AMERICAN UNIVERSITIES, NATIONAL ASSOCIATION OF INDEPENDENT COLLEGES AND UNIVERSITIES, AND NATIONAL ASSOCIATION OF STATE UNIVERSITIES AND LAND-GRANT COLLEGES IN SUPPORT OF PETITIONERS

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BRIEF OF AMICI CURIAE AMERICAN COUNCIL ON EDUCATION, AMERICAN ASSOCIATION OF STATE COLLEGES AND UNIVERSITIES, ASSOCIATION OF AMERICAN UNIVERSITIES, NATIONAL ASSOCIATION OF INDEPENDENT COLLEGES AND UNIVERSITIES, AND NATIONAL ASSOCIATION OF STATE UNIVERSITIES AND LAND-GRANT COLLEGES IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST OF AMICI CURIAE

The American Council on Education is a national organization that represents approximately 1800 higher education institutions, including a substantial majority of public and private colleges and universities in the United States. Its principal purpose is to further the interests of component groups of the higher education community,

including students, faculty, administration, and employees. The American Association of State Colleges and Universities represents more than 370 state colleges and universities; it sponsors research and publishes reports on numerous aspects of higher education. The Association of American Universities represents approximately 60 public and independent American and Canadian universities with strong programs of graduate and professional education and research. The National Association of Independent Colleges and Universities represents over 840 independent colleges and universities on public policy issues before the legislative, executive, and regulatory branches of the federal government. The National Association of State Universities and Land-Grant Colleges represents over 170 public research universities; it works to support the contributions that state and land-grant universities make through teaching, research, and public service/extension.

Amici collectively represent the breadth and diversity of American higher education. They share a commitment to fulfill the mandate of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, including by expanding educational opportunities for women where doors previously have been closed to them, and by ensuring that all men and women in American colleges and universities receive an education free of sex-based discrimination.

Amici's members strongly support the objective of Title IX to enable women to develop their full potential in athletics as well as in other educational endeavors. Colleges and universities throughout this country greatly enlarged their athletic offerings for women after the statute's passage, and the number of women participating in college varsity sports has burgeoned. With this brief amici do not suggest that the goal of Title IX has been everywhere realized or that all discrimination against women has been eradicated. As shown below, however, the goal of eradicating discrimination is disserved by the legal standard the First Circuit adopted in this case.

Under that standard, colleges and universities that do not discriminate are at risk of being held in violation of Title IX simply because men and women choose not to participate in varsity athletic programs in statistical proportion to their

enrollment. Only two alternatives to proportional representation of the sexes in varsity sports programs can be tolerated under the First Circuit rule: "march[ing] uninterruptedly" toward statistical parity by continually expanding women's programs, or "fully" meeting all women's (but not men's) athletic interests, even if that means giving women "what amounts to a larger slice of a shrinking athletic-opportunity pie." Pet. App. 34a[1] (internal quotation marks omitted). Amici believe that the First Circuit ruling will frustrate their members' efforts to comply with the statute.

This brief is filed with the consent of the parties. Consent letters have been filed with the Clerk.

STATEMENT OF THE CASE

This case arises from a decision of a divided panel of the United States Court of Appeals for the First Circuit holding that Brown University -- which dramatically expanded its women's athletics program in the years after Title IX was enacted, Pet. App. 6a -- violated the statute when financial pressures forced it to change two women's and two men's teams from university-funded to donor-funded status. The First Circuit held that a university's varsity athletics program always violates Title IX unless (1) men and women participate in the program in numbers substantially proportionate to their respective undergraduate enrollments at the university, or (2) the university "continu[ously]" expands its women's athletics program, or (3) "fully" satisfies all athletic interest of women. *Id.* at 32a, 189a-190a.

Amici adopt the statement of the case set forth in the Petition. We emphasize, moreover, that Brown's commitment to providing equal opportunity for all of its students, its success in developing a strong women's sports program, and its inability to satisfy the rigid three-part test notwithstanding these affirmative efforts, in salient respects mirror the experience of many American colleges and universities.

Colleges and universities over the last two decades have made enormous progress in effectively encouraging women's

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[1] "Pet. App." refers to Petitioners' Appendix.

participation in their programs. At the time of Title IX's passage, many institutions had only recently begun to admit women. Today women receive more than half of the bachelor's degrees awarded nationally and graduate in large numbers with majors and degrees in fields, such as engineering and the physical and life sciences, historically dominated by men. *See* National Center for Education Statistics, *Digest of Education Statistics 1996* at 253, 258-265 (1996).

Higher education institutions' commitment to Title IX is manifest in their athletic programs, which teach students physical skills, leadership skills, self-discipline, and the value of teamwork. Colleges and universities have made major efforts to encourage women to participate in sports, in an attempt to reverse swiftly centuries of cultural stereotyping that has impeded the realization of women's athletic potential. *See generally* Diles, *Historical Overview of Title IX*, *in* National Association of College and University Attorneys, *A Practical Guide to Title IX: Law, Principles, and Practices* 3, 10-18 (Connolly ed. 1995) (explaining that various factors, including misunderstandings about women's health and cultural images of women as passive and fragile, historically have limited women's participation in competitive sports).

Across the country, athletic offerings available to women have been vastly expanded. Shortly after Title IX was enacted in 1972, women's participation in intercollegiate sports increased substantially. By 1984, the percentage of college varsity positions held by women had more than doubled, from 15 to over 30 percent. *See* Davidson & Kerr, *Title IX: What Is Gender Equity?*, 2 Vill. Sports & Entertainment L.F. 25, 25 (1995). Since then, women have consistently filled about 30 to 36 percent of varsity positions nationwide. *See* National Collegiate Athletic Association, *Participation Statistics Report* 5 (1995).

Colleges and universities today routinely field a wide array of both men's and women's intercollegiate teams, such as basketball, track, fencing, tennis, swimming, lacrosse, soccer, skiing, and volleyball. At the time of trial in this case, for example, Brown offered 16 varsity sports for women and 16 for men. Pet. App. 7a. At some institutions, including

Brown, women also participate on co-ed teams in non-contact sports such as crew and golf. *Id.* at 97a.

Just as men and women for various complex reasons often have shown different interest levels in particular academic subjects and other educational activities, so have they in intercollegiate sports. No observer's crystal ball has yet predicted reliably the percentage of women who will want to participate in intercollegiate sports ten, twenty, or one hundred years from now. By all measures, however, men and women do not now participate in competitive sports to the same extent, nor have they historically.

Nationwide, men and women now participate in intercollegiate varsity programs at a ratio of approximately two to one. That ratio reflects the percentages of girls and boys who participate in competitive high school sports, from which many, if not most, college varsity players are attracted. *See* Davidson & Kerr at 28. Notably, moreover, women's participation in college varsity athletics exceeds their participation in other college sports programs, such as club and intramural sports. Nationally, men participate almost twice as often as women in club sports, and the ratio of men to women playing intramural sports is almost four to one. *See* Brief of Appellants at 12 nn.15 & 16, *Cohen* v. *Brown Univ.*, 101 F.3d 155 (1st Cir. 1996) (summarizing record evidence).

The record in this case also shows that women and men consistently demonstrate different interest levels in playing intercollegiate sports. For example, over a four-year period, male applicants to Brown expressed much more interest in playing competitive sports than did female applicants. Annual surveys of Brown's entering freshmen classes likewise show that more men than women plan to participate in varsity programs. These results are consistent with a recent independently conducted nationwide survey showing that only 35 to 40 percent of college freshmen who proposed to play varsity sports were women. *See id.* at 8-14.

SUMMARY OF ARGUMENT

This Court has repeatedly held that statistical evidence of discrimination, to be meaningful, must draw comparisons that illumine the legal question at issue and have a reasonable basis

in fact. The First Circuit did not heed that directive in this case.

Title IX, which amici strongly support, requires equal opportunity. Its plain language, its legislative history, its implementing regulation, and interpretations of the enforcing agency all eschew findings of unequal opportunity based solely on statistical disparity of participation. The First Circuit test, by contrast, establishes a presumption that an institution has discriminated whenever the percentages of men and women participating in its intercollegiate athletics program are not proportional to their enrollment. The presumption has no empirical basis, because, for reasons not connected to a college's or university's conduct, fewer women currently choose to participate in intercollegiate sports than do men. The presumption also has no basis in the governing statute and regulation, which make clear that colleges and universities need not achieve statistical balance in their athletic programs so long as men's and women's differing athletic interests are accommodated equally effectively.

Further, the First Circuit presumption is effectively irrebuttable, because the court's three-part test permits colleges and universities to avoid an adverse finding only if they continuously expand athletic programs for women or meet the athletic interests of every woman (but not every man) who is qualified to play on a viable varsity team. Many institutions cannot satisfy this test, both because their resources are finite and because to do so in practice would entail elimination of programs merely because men participate in them.

Remarkably, the First Circuit presumption has been adopted by several other circuits and the federal agency responsible for enforcing Title IX. It therefore affects virtually every college and university in the country. Shorn of the impracticable alternatives it offers, the test effectively requires numerical equivalence and concludes that whenever there is statistical imbalance, the institution must fully accommodate all athletic interest of women, regardless of the impact on other educational programs.

By converting a sound and desirable antidiscrimination principle into a mandate for numerical equivalence between the sexes, the test collides with the core precept of Title IX -- that students shall not be subjected to sex discrimination. The decision below cannot be reconciled with law, logic, or experience and warrants plenary review by this Court.

ARGUMENT

I. THE FIRST CIRCUIT TEST FOR DETERMINING TITLE IX COMPLIANCE IS IRRECONCILABLE WITH THE STATUTE, THE REGULATION, ADMINISTRATIVE INTERPRETATIONS, AND THIS COURT'S PRECEDENTS

The First Circuit test establishes a legal presumption of discrimination whenever there is a statistical disparity between the percentage of women in a college's varsity athletic program and the percentage of undergraduate women. Pet. App. 23a. As this Court has often stated, evidentiary presumptions are warranted when "supported by considerations of 'fairness, public policy, and probability.'" *United States Dep't of Justice* v. *Landano*, 508 U.S. 165, 174 (1993) (quoting *Basic Inc.* v. *Levinson*, 485 U.S. 224, 245 (1988)). The presumption here has none of those attributes.

If there were persuasive evidence that, absent the discrimination prohibited by Title IX, equal numbers of women and men would participate in varsity athletics, the presumption might be warranted. But -- notwithstanding the lower court's erroneous suggestion to the contrary, Pet. App. 187a -- amici know of no congressional or administrative determination that this is so, and compelling evidence shows that it is not.

As explained above, despite the vast expansion of women's athletics programs in the years following Title IX's passage, women continue to participate in varsity, club, and intramural sports far less than do men, relative to their enrollments. The record in this case demonstrates that, by a variety of measures, women and men have expressed different interest levels in participating in competitive sports. That the causes underlying those choices are complex and deeply rooted in historical, sociological, and cultural factors amici fully

acknowledge. The language and history of Title IX show, however, that such factors, unless connected to institutional discriminatory conduct, do not make out a violation of the statute.

Title IX, which prohibits discrimination in educational programs and activities on the basis of sex, 20 U.S.C. § 1681(a), clearly does not mandate numerical equivalence between the ratio of men and women in a college's sports program and in its student body. Section 1681(b) specifically precludes interpretations of the statute that "require any educational institution to grant preferential or disparate treatment to the members of one sex" based on a statistical imbalance between the percentages of men and women in an educational program and in any larger community. *Id.* § 1681(b).

Although section 1681(b) provides that some statistical evidence may be probative of a Title IX violation, *id.*, nothing in the statute suggests that a discrimination finding can be predicated on a statistical comparison between men's and women's enrollment rates and their participation in athletic programs. Congress not only legislated no such statistical test, it abjured doing so. The members of Congress who supported passage of Title IX repeatedly disavowed similar statistical comparisons with regard to admissions. *See, e.g.*, 117 Cong. Rec. 30,406 (1971) (statement of Sen. Bayh: statute does not require "a 50-50 ratio" of men and women in every educational program); *id.* at 39,251 (statement of Rep. Green: "[I]f a college has 5,000 men and 3,000 or 4,000 women," Title IX does not require it to "bring the number of women up to 5,000. If we do that, then we are engaging in discrimination, also. In that case we would be discriminating against men"); *id.* at 39,252 (statement of Rep. Mink: "Even if 90 percent of those admitted to science departments were men, there could be no complaint as long as those women who did apply were considered on an equal basis with men").

Likewise, the statute's implementing regulation, 34 C.F.R. §§ 106.1-106.71, recognizes that, with regard to athletics, men's and women's participation will differ, and the difference cannot be equated with discrimination. Because their athletic interests are not fungible, the regulation specifically permits separate men's and women's teams, *id.*

§ 106.41(b), and makes athletic participation levels, rather than student enrollment, the benchmark for determining whether an institution's athletic scholarships comport with the statute, *id.* § 106.37(c). Thus, the measure of discrimination is not numerical equivalence between the sexes, but whether men's and women's differing athletic interests are "effectively accommodate[d]." *Id.* § 106.41(c)(1).

The First Circuit presumption is drawn not from the statute or regulation, but rather from a brief and not particularly prominent passage of a 1979 policy statement issued by the federal agency responsible for administering Title IX.[2] *See* Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979) ("Policy Interpretation"). The presumption, however, is not even consistent with the agency's own interpretations of the statute. The agency repeatedly has read Title IX to require not an equal number of women and men in athletic programs, but equal athletic opportunities for both sexes, respectful of their different athletic interests.

For example, when it issued its proposed Policy Interpretation for public comment, the agency expressly recognized that "[i]ntercollegiate athletic programs that provide equal opportunities for both sexes may offer different sports, and have different participation rates and varying competition opportunities for men and for women, because their interests and abilities may be different," and that "[t]hese differences will result in different men's and women's programs that do not violate Title IX." Title IX and Intercollegiate Athletics; Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance, 43 Fed. Reg. 58,070, 58,072 (Dec. 11, 1978). *See also id.* at 58,074 ("The Title IX regulation does not require an equal number of men and women participants or an equal number of men's and women's sports. Rather, it requires that the interests and abilities of men and women be equally accommodated").

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[2] In the 1970s Title IX was administered by the Department of Health, Education, and Welfare. It is now administered by the Office of Civil Rights (OCR) of the Department of Education.

The final Policy Interpretation reaffirms that statistical balancing is not the statutory goal. *See* 44 Fed. Reg. at 71,414 ("[T]he governing principle * * * is that the athletic interests and abilities of male and female students must be equally effectively accommodated"). For example, it asks whether the "competitive schedules for men's and women's teams * * * afford proportionally similar numbers of male and female *athletes*" -- not students enrolled -- "equivalently advanced competitive opportunities." *Id.* at 71,418 (emphasis added). And in determining an institution's overall compliance with the equal opportunity requirement, the Policy Interpretation asks not whether the institution provides benefits to men and women proportional to their enrollments, but whether "the institution's athletic program as a whole" exhibits "disparities of a substantial and unjustified nature in the benefits, treatment, services, or opportunities afforded male and female athletes." *Id.*

The agency's investigator's manuals have stressed the same principles. The 1980 manual, for example, explained that "Title IX does not require institutions to offer a proportional number of intercollegiate participation opportunities," but rather "requires institutions to meet the interests and abilities of women to the same degree as they meet the interests and abilities of men, by providing opportunities which address the interests and abilities of each sex equally." Office of Civil Rights, U.S. Dep't of Education, Title IX Intercollegiate Athletics Investigator's Manual 122 (1980). The 1990 manual likewise stated that an institution, to comply with Title IX, must show that its athletic program "equally effectively accommodates student interests and abilities." Office of Civil Rights, U.S. Dep't of Education, Title IX Athletics Investigator's Manual 25 (1990).

Thus, the First Circuit's erroneous statistical gauge not only contravenes the governing statute and regulation, but also is an anomaly even among the administering agency's own pronouncements. Loosed from its moorings in the agency's overall enforcement scheme, the presumption is irreconcilable with Title IX's equality principle. The First Circuit therefore erred in deferring to it. *See Stinson* v. *United States*, 508 U.S. 36, 45 (1993) (no deference owed to agency interpretation that is inconsistent with federal statute or

regulation). *See also Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994) (no deference owed to agency interpretation where different reading "'is compelled by * * * other indications of the [agency's] intent at the time of the regulation's promulgation'" (quoting *Gardebring* v. *Jenkins*, 485 U.S. 415, 430 (1988))).

The presumption also conflicts with this Court's decisions interpreting Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17, which prohibits employment discrimination on the basis of sex and other enumerated characteristics. *Id.* § 2000e-2(a). Those decisions make clear that, while statistical evidence may be useful in proving the existence or absence of discrimination, *see, e.g.*, *Hazelwood Sch. Dist.* v. *United States*, 433 U.S. 299, 307 (1977), *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 339 (1977), such evidence must comport with the statute's purpose and have a reasonable basis in fact.

For example, in *Wards Cove Packing Co.* v. *Atonio*, 490 U.S. 642 (1989), this Court rejected, as nonprobative, statistical evidence that compared the high percentage of an employer's nonwhite workers in unskilled positions with the low percentage of nonwhites in higher-paying, skilled positions. That comparison was "nonsensical," according to the Court, because the absence of minorities in skilled positions could have been due to a shortage of qualified minority applicants "for reasons that are not [the employer's] fault." *Id.* at 651.

Here, as in *Wards Cove*, "'[t]here can be no doubt'" that the First Circuit's comparison between students' athletic participation rates and enrollment "'fundamentally misconceived the role of statistics in * * * discrimination cases.'" *Id.* at 650 (quoting *Hazelwood*, 433 U.S. at 308). The comparison disregards reliable and uncontroverted evidence that men's and women's athletic interests differ for a variety of reasons unrelated to a college's or university's conduct and therefore cannot be probative of whether an institution has discriminated.

The First Circuit deemed this Court's Title VII decisions irrelevant, reasoning that sports teams, unlike most jobs, are often segregated by sex. Pet. App. 36a-39a. That difference

probably does signify that the particular analyses used under Title VII should not apply in exactly the same way under Title IX. But the difference between the laws' contexts plainly does not render inapposite the principles this Court has developed to govern the probative value of statistical evidence in discrimination cases. On the contrary, because section 1681(b) of Title IX was expressly modeled on a similar provision in Title VII, 42 U.S.C. § 2000e-2(j), *see* 117 Cong. Rec. 39,261-39,262 (1971), the First Circuit should have been guided by this Court's Title VII precedents. *See West Virginia Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 94-95 (1991) (relying on construction of similarly worded laws as guide to interpreting statute).

II. THE TEST IMPOSES INSURMOUNTABLE BURDENS ON COLLEGES AND UNIVERSITIES AND MAY LEAD TO THE VERY DISCRIMINATION THAT TITLE IX PROHIBITS

Although the First Circuit characterized its proportionality test as "a rebuttable presumption, rather than an inflexible requirement," Pet. App. 23a, the presumption "is in practice all but irrebuttable." *Landano*, 508 U.S. at 177. The inference of discrimination that arises from a statistical disparity between student athletic participation and enrollment can be overcome in two and only two ways: with evidence that the institution has "fully" accommodated all desires of women who are interested and able to play varsity sports (provided there is enough interest to support a team and a competitive schedule), or with evidence that the institution is continuously increasing its women's sports program.

No college or university is likely to have unlimited resources to achieve these extreme measurements. Brown does not. Neither measure reliably demonstrates whether an institution provides men and women equal athletic opportunities. Neither is a good, and certainly not an infallible, test of whether an institution practices sex-based discrimination. Rather, as the First Circuit candidly acknowledged, each is but another "proxy for gender balance," Pet. App. 181a -- a balance that Title IX emphatically does not require.

1. *Continuing Program Expansion.* Whatever merit the "continuing program expansion" concept may have had shortly after Title IX was enacted -- when the concept enabled an institution that had no women's athletic program to avoid an adverse finding by showing substantial efforts to come into compliance -- it has none now. The requirement makes little sense today, when women's sports programs are ubiquitous and women participate in competitive sports in the largest numbers ever.

Indefinite continued expansion of women's (or men's) athletic programs is infeasible for many colleges and universities. And there is no reason to require it, since the absence of continuing program expansion at an institution with an already vital women's program cannot be dispositive or even probative of whether the institution discriminates against women athletes. As Chief Judge Torruella recognized in dissent, there is "no possible justification" for a rule that requires a college continually to increase athletic opportunities for women, "even if it cannot afford to do so," until a program of a particular size is achieved. Title IX is "intended to protect against discrimination, not to promote athletics on college campuses." *Id.* at 72a.

Moreover, the requirement perversely penalizes institutions such as Brown that sought energetically to bring their athletic programs into compliance with Title IX soon after the statute's enactment. Under the First Circuit rule, a university cannot achieve statutory compliance by immediate equal accommodation of men's and women's athletic interests. Rather, it must demonstrate a continuing program of improvements -- indeed, a perpetual one. The inquiry therefore creates a peculiar and contrary incentive for institutions: to delay needed improvements in women's athletic programs so that ongoing betterment can be displayed.

2. *Full Accommodation.* The only other way that an institution faced with statistical disparity between women's enrollment and athletic participation can achieve Title IX compliance under the First Circuit test is to accommodate women's athletic interests "fully." In practice, under this requirement the institution must create and fund a women's varsity team when even one woman wants and is able to

compete -- regardless of the expense, and regardless of the impact on all other university programs. Academic course offerings, scholarship aid, even dormitory maintenance are to be sacrificed to achieve full accommodation of women's sports interests. And even then, as the dissent observed, the test is "virtually impossible" to satisfy, because "[u]nder even the largest athletic program, it would be surprising to find that there is not a single student who would prefer to participate in athletics but does not do so because the school does not offer a program in the particular sport that interests the student." *Id.* at 74a.

Like the "continuing program expansion" requirement, the "full accommodation" requirement places an onerous and unprecedented financial burden on colleges and universities that, like Brown, already spend millions of dollars annually to provide students with broadly diverse athletic opportunities. There is no basis in the law for requiring the *full* accommodation of members of one sex -- particularly when such accommodation is not linked to or designed to remedy discrimination by the institution.

That women's interests may not be fully met does not, by itself, prove discrimination, because it ignores the way that an institution treats men. If men's and women's interests are equally effectively accommodated, there is no differential treatment, and thus no violation of the statute, regardless of the extent to which some individuals' wishes are unrealized. Any other reading vitiates Title IX's equal opportunity mandate.

Further, institutions that attempt to comply with the "full accommodation" requirement do so at risk of violating the rights of male students. If *all* expressed athletic interest of women is met, it may well be impracticable for an institution also to meet interests of men, because men generally express far more interest in participating in sports at all levels of competition than do women. And if women are accommodated because of their sex more than men are, then men are likely to claim that they are deprived of equal opportunity.

Equal educational opportunity for men and women is an exceedingly important goal that amici's member institutions

have undertaken to achieve. But the means the First Circuit has adopted of measuring a university's compliance with Title IX's prohibition against sex-based discrimination in athletic programs -- a test that by its nature neither identifies nor remedies discriminatory practices -- is at war with the statutory objective.

III. THE TEST AFFECTS HIGHER EDUCATION INSTITUTIONS THROUGHOUT THE COUNTRY AND WARRANTS THIS COURT'S PLENARY REVIEW

The test that the First Circuit embraced has been adopted by a number of circuits, Pet. App. 26a, and was recently endorsed by the federal agency charged with administering Title IX. *Id.* at 294a-316a. Thus, colleges and universities across the country are at risk of judicial or administrative determinations that their athletic programs violate Title IX -- even though they have undertaken in good faith to provide equal opportunities for all student athletes -- simply because men and women, for a variety of reasons unrelated to institutional discrimination, choose not to participate in varsity sports in the same numbers.

At its core, this case is about whether Title IX holds higher education institutions axiomatically accountable for college women's and men's choices whether to participate in intercollegiate sports, and whether Title IX signifies that institutions that have tremendously expanded athletic opportunities for women must do still more, even absent evidence of discriminatory conduct. These questions are not accurately answered by the First Circuit's rigid three-part test. Because the decision below conflicts with this Court's antidiscrimination jurisprudence, is clearly wrong, and presents an issue of exceptional importance to higher education institutions throughout the Nation, amici urge this Court to grant certiorari.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the Petition, amici respectfully urge this Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAR 21 1997
CLERK

(6)

No. 96-1321

In The Supreme Court of the United States

October Term 1996

BROWN UNIVERSITY, *et al.*,
Petitioners,
v.
AMY COHEN, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals for the First Circuit

BRIEF OF 60 COLLEGES AND UNIVERSITIES AS AMICI CURIAE IN SUPPORT OF PETITION

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University of Notre Dame
University of Pittsburgh
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In The
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BROWN UNIVERSITY, *et al.*, ,

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AMY COHEN, *et al.*,

Respondents.

BRIEF OF 60 COLLEGES AND UNIVERSITIES AS AMICI CURIAE IN SUPPORT OF PETITION

INTEREST OF THE AMICI CURIAE

Amici Curiae respectfully submit the within Brief in support of the Petition of Writ of Certiorari, the written consent of each party having been obtained and filed with the Clerk of this Court.

Amici Curiae are an *ad hoc* group of 60 colleges and universities representing a broad cross section of American post-secondary educational institutions. Each amicus receives federal financial assistance and, therefore, is subject to the mandates of Title IX. Each amicus is concerned by the decision of the United States Court of Appeals for the First Circuit ("First Circuit") in that compliance with the First Circuit's interpretation of Title IX as applied nationwide by the Office For Civil Rights ("OCR") has and will require extensive and costly modifications to its educational programs including, but not limited to, its varsity athletic programs.

The diversity of amici illustrates why it is important for this Court to grant Brown University's petition for a writ of

certiorari so that clear and appropriate standards for compliance with Title IX may be applied across the country. Amici include other private schools, both large and small, including Brandeis University, Clark University, Colgate University, Emory University, Fairfield University, George Washington University, Johns Hopkins University, Lehigh University, New York University, Northwestern University, Tulane University, the University of Miami, the University of Southern California, and Wake Forest University.

Schools with a religious orientation also are participating as amici, including Baylor University, Boston University, Brigham Young University, College of the Holy Cross, Duquesne University, Muhlenberg College, Saint Louis University, Saint Peter's College, Southern Methodist University and the University of Notre Dame.

Finally, the amici include a group of state or state-related institutions such as Arkansas State University, Ball State University, Louisiana State University, New Mexico State University, Oklahoma State University, the eight universities which comprise the Texas State University System, the University of Arkansas, the University of Illinois, the University of Missouri, the University of Nebraska, the University of New Mexico, the University of Pittsburgh, the University of Tennessee, the University of Tulsa, West Virginia University and the 14 universities which comprise the Pennsylvania State System of Higher Education.

Thus, the colleges and universities which urge the Court to grant Brown's petition for a writ of certiorari include schools of all types and sizes and throughout the country. It is

unusual for such a large and diverse group of colleges and universities to join in asking this Court to review a particular case. Nevertheless, this group has come together to make that request here because the decision of the First Circuit in this case has changed the meaning of Title IX in a way contrary to the express language of the statute. Moreover, the decision has had nationwide import because it has been applied nationwide by OCR. Thus, this case is an unusually appropriate one for this Court to review.

Until recently, educational institutions subject to Title IX relied upon the explicit provisions of Title IX which forbid the use of quotas.[1] Further, for many years the OCR, which administers Title IX compliance, has explained that institutions are required to "meet the interests and abilities of women to the same degree as they meet the interests and abilities of men" and that educational institutions are "not require[d] ... to offer ... intercollegiate participation opportunities" that are proportional

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1 Section 901(b) of Title IX provides as follows:

> Nothing contained [therein] shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area.

20 U.S.C. §1681(b).

to the "division by sex of the total student enrollment."[2] After the First Circuit's decision in this case, however, the OCR in 1996 adopted the position of the First Circuit that a statistical imbalance can establish a Title IX violation.[3] Thus, until the First Circuit's decision and the OCR's recent change in its interpretation of Title IX, educational institutions were not required to establish the same proportion of varsity positions as the ratio of sexes in their student body in order to conform to Title IX. If the First Circuit's interpretation and the new OCR position were to become the standard under which Title IX compliance is measured, educational institutions will need to make far reaching changes in their athletic and other educational programs.

The confusion and compliance difficulties mandated by the First Circuit's decision and the recent OCR's adoption of the First Circuit's position are not confined to athletics because the overall scope of Title IX's application in recent years has broadened considerably. Following this Court's decision in *Grove City College v. Bell*, 465 U.S. 555 (1984), Congress passed the Civil Rights Restoration Act of 1987 and legislatively overturned the *Grove City* decision.[4] In *Grove*

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2 OCR Title IX Intercollegiate Athletics Investigator's Manual at 122 (1980), App. 291a-293a.

3 Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test, dated January 16, 1996, App. 294a-316a.

4 The Civil Rights Restoration Act of 1987 added a new section to Title IX defining a program as including a "college,

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City, this Court determined that the reach of Title IX was program-specific. The Civil Rights Restoration Act of 1987 extended the reach of Title IX to all aspects of an educational institution receiving federal financial assistance, not just the specific program that was receiving the financial assistance. Thus, with the implementation of the Civil Rights Restoration Act of 1987, Title IX's reach was considerably expanded. Receipt of federal funds by any part of a college or university now requires Title IX compliance throughout the college or university. An educational institution now needs to design compliance procedures for all of its programs. Thus, the inherent dangers contained in the First Circuit's statistical quota approach may create considerable confusion concerning the compliance obligations well beyond varsity athletic programs.

Accordingly, amici urge review by this Court to clarify the fundamental concept of discrimination that will be applied under Title IX. Well-meaning educational administrators will have to determine whether to accept the numerical balancing approach of the First Circuit. If they do so, considerable reallocation of scarce educational resources will need to be made either to increase female varsity athletic positions and/or to decrease male varsity athletic positions. With diminishing sources of funding for such programs, decisions to disband or to curtail athletic programs may need to be made. Considerable long-term harm can occur to established athletic programs in

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university, or other postsecondary institution, or a public system of higher education." *See* 20 U.S.C. §1687(2)(A).

order to comply with the First Circuit's interpretation of Title IX. New programs established to conform to this new statistical quota approach can take years to establish and subsequently may need to be abandoned if this new statistical quota approach is finally rejected. In this situation, a review by this Court of the "rules of the game" is necessary so that compliance obligations can be understood.

No one doubts that considerable strides have been made in women's athletics since Title IX was enacted. However, with the OCR's acceptance of the First Circuit's interpretation and with the expansion of the reach of Title IX, it is now necessary that the fundamental goal of Title IX be defined by this Court. Does Title IX require that an educational institution assure that varsity athletic positions mirror the student population, or does Title IX require that, in allocating athletic opportunity, an educational institution disregard the factor of sex? Do we as a society recognize that males and females can have different levels of interest, which could explain a given statistical result? Does Title IX require equal accommodation of the varying interests of men and women or does it require that resources be allocated strictly on the basis of the numbers of each sex in a student body, regardless of interest?

Only this Court can definitively answer these fundamental questions posed by the First Circuit's decision in this case. Only this Court can define what Congress meant when it prohibited discrimination "on the basis of sex" in Title IX. Only this Court can provide definitive guidance on the meaning of Title IX.

It is for these reasons that these numerous and diverse colleges and universities have joined to ask this Court to review this case.

REASONS FOR GRANTING THE WRIT

The question presented in this case is the fundamental definition of discrimination under Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681 *et seq.*[5] This Court needs to review this case and to provide guidance to the lower courts on what Congress meant when it prohibited discrimination in educational programs on the basis of sex. The question presented is whether an educational institution fulfills Title IX's mandate when it equally accommodates the interests of its male and female athletes or must a school have the same proportion of male and female varsity athletic positions as the proportion of males and females in its student body, regardless of any varying levels of interest in such athletic positions.

In a two to one decision, with Chief Judge Torruella dissenting, the First Circuit determined that a statistical disparity between the percentage of females in a student body and the percentage of female varsity athletic positions establishes a violation of Title IX. The only defenses recognized by the First Circuit were if an educational institution

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5 Section 901(a) of Title IX provides that no person shall be excluded from, denied the benefits of or subjected to discrimination "on the basis of sex" under any educational program receiving Federal financial assistance. 20 U.S.C. §1681(a).

can demonstrate a history and continuing practice of program expansion for the underrepresented group or a full accommodation of the underrepresented group in its educational program. In making this holding, the First Circuit assumed that any statistical disparity between the student body and athletic participation was the result of discrimination. The First Circuit rejected Brown University's attempt to explain that the disparity was the result of other causes, for example, different levels of interest. The First Circuit dismissed as irrelevant Brown's attempt to explain the disparity as due to differences in interest level.

> We conclude that, even if it can be empirically demonstrated that, at a particular time, women have less interest in sports than do men, such evidence, standing alone, cannot justify providing fewer athletics opportunities for women than for men.

App. 42a.

The implications of this holding are far reaching, both as to the legal standards for Title IX compliance and as to the effect upon educational institutions trying to administer their athletic programs. Post-secondary educational institutions have made enormous strides in increasing athletic opportunities for women. With the inherent competition between male and female athletic programs for scarce economic and other resources, it is necessary to clarify the fundamental question presented in this case. Except for remedial measures after liability has been established, our civil rights laws have never required the kind of proportionate allocations or quotas used by the First Circuit.

The First Circuit's Decision Is Contrary To And Conflicts With Decisions Of This Court.

Contrary to the wording of Title IX which does no more than prohibit discrimination "on the basis of sex," the First Circuit's decision virtually eliminates the requirement of causation, *i.e.* that the reason for the disparity be sex discrimination. Instead of the clear statutory wording, the First Circuit held that a statistical disparity establishes a Title IX violation and that the only defenses are that a college or university has a history and continuing practice of program expansion for female athletes or that female athletes have been fully accommodated in the athletic program. These "defenses," however, are in effect nothing more than a recognition that Title IX compliance will take time and that educational institutions need not create or preserve programs for an underrepresented group that are not viable because of lack of interest. The polestar of a violation remains the fact of a statistical disparity, regardless of cause. Under this definition of discrimination, the issue is not whether the abilities and/or interests of male and female athletes are equally accommodated but whether each group gets its quota of the available varsity positions as measured by their percentage in the student body.

This new definition of "discrimination" is contrary to the long line of civil rights cases decided by this Court which consistently have required that a plaintiff prove that a prohibited factor caused the harm under attack. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). In approving the use of statistics as evidence of discrimination, this Court has

recognized that statistics "come in infinite variety and, like any other kind of evidence, they may be rebutted" and that "their usefulness depends upon all of the surrounding facts and circumstances." *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 340 (1977).

In determining the usefulness of statistical evidence, this Court has required that the statistical evidence be refined as much as possible to eliminate other potential explanations for a disparity. *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977). Raw, bottom line statistics which fail to identify the pool of qualified applicants have been rejected because they fail to permit an inference from a mere statistical imbalance. *Id.* The purpose is to assure the offending test, criteria, selection device, decision, etc. is identified and that an inference of discrimination is appropriate. This Court has rejected "bottom line" statistics where a plaintiff has attempted to use such statistics offensively. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (Plaintiff must establish a causal link between a specific employment practice and the observed disparities). This Court has also rejected "bottom line" statistics where a defendant attempted to use such statistics defensively. *Connecticut v. Teal*, 457 U.S. 440 (1982). As with any other evidence, a defendant may challenge the statistics or explain the disparity by pointing to other causes for a statistical disparity. *Teamsters, supra.* The evidentiary inquiry is whether the statistics are sufficiently tailored to

support an inference of discrimination. *Hazelwood School Dist., supra.*[6]

Without proper tailoring, statistical evidence is not meaningful and does not permit an inference of discrimination. Although decided under the "disparate impact" theory available under Title VII,[7] this Court's decision in *Wards Cove, supra,*

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6 In addition to turning a blind eye to varying levels of interest as a potential explanation for the statistical disparity, the "bottom line" statistical parity required by the First Circuit's decision fails to take into account differences in varsity athletic programs permitted under the OCR's regulations. The OCR's regulations permit educational institutions to operate single sex teams in contact sports. *See* 34 C.F.R. §106.41(b). Thus, if a school has a male varsity football team, a contact sport which requires a large squad of male athletes, the "bottom line" statistics will be skewed by this large number of varsity positions. Against this backdrop of permitted single sex teams in contact sports, as Chief Judge Torruella explained in his dissent, "it does not make sense to include in the calculus athletes participating in contact sports that include only men's teams." App. 70a-71a.

7 The "disparate impact" analysis is available under Title VII of the Civil Rights Act of 1964 because of the specific language of Section 703(a)(2), 42 U.S.C. §2000e-2(a)(2), which forbids employment practices that "adversely affect" an employee's status because of sex. In contrast, Section 703(a)(1) of Title VII, 42 U.S.C. §2000e-2(a)(1), specifically forbids discrimination in employment terms "because of" an individual's sex, what is commonly called "disparate treatment." Like Section 703(a)(1) of Title VII, Title IX forbids discrimination "on the basis of sex" and, unlike Title VII, Title IX contains no comparable "disparate impact" provision. Thus, if anything, Title IX, by its terms, presents less justification than Title VII does for the "statistical parity" approach of the First Circuit. Moreover, as summarized *supra*

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illustrates the problem. In *Wards Cove*, this Court reversed a determination of liability based upon a statistical imbalance between the percentage of non-white workers occupying skilled positions and the percentage of non-white workers occupying non-skilled positions. This Court specifically rejected this comparison and held that a bottom line racial imbalance in an employer's work force does not establish a prima facie case of disparate impact. In requiring that a plaintiff identify and statistically isolate a specific employment practice, this Court explained:

> Respondents will also have to demonstrate that the disparity they complain of is the result of one or more of the employment practices that they are attacking here, specifically showing that each challenged practice has a significantly disparate impact on employment opportunities for whites and nonwhites. To hold otherwise would result in employers being potentially liable for "the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces." *Watson v. Fort Worth Bank & Trust, supra,* 487 U.S. at 992, 108 S.Ct. at 2787.

490 U.S. at 657.

This same problem exists in this case. Brown University was not permitted to introduce as an explanation for

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in discussing *Wards Cove* and *Teal*, this Court did not even permit, under Title VII's disparate impact analysis, the type of "bottom line" statistical approach adopted by the First Circuit.

the statistical disparity the considerable evidence[8] it had that women students did not have the same level of interest in varsity athletics as men students. As in *Wards Cove*, this meant that Brown University could be "potentially liable for 'the myriad of innocent causes that may lead to statistical imbalances.'" *Id.*

Under the First Circuit's approach, the statistics are not merely one form of evidence of discrimination, but are conclusive proof of liability, regardless of any explanation. Used this way, the statistics are nothing more than a quota.[9] They are not means to an end, *i.e.* evidence used to prove discrimination. They are the end, *i.e.* discrimination is found regardless of any other explanations for an alleged disparity. No civil rights statute has ever been interpreted by this Court in such a manner.

Equally troubling is the fact that achieving statistical parity between enrollment and varsity positions was held by the First Circuit to establish compliance with Title IX. "[A] university ... may stay on the sunny side of Title IX simply by maintaining gender parity between its student body and its athletic lineup." App. 181a. Just as this Court rejected in *Wards Cove, supra*, "bottom line" statistics as establishing discrimination, this Court has rejected "bottom line" statistics

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8 *See* fn. 30 in Chief Judge Torruella's dissent which summarized this evidence, App. 82a.

9 Chief Judge Torruella in his dissent convincingly explains why the "legally cognizable characteristics that render a quota scheme impermissible" are present "in spades." App. 76a-80a.

as a defense. *Connecticut v. Teal*, 457 U.S. 440 (1982). Surely it is not difficult to imagine situations where individuals could be deprived of the benefit of a federally financed educational program on the basis of sex where, at the same time, a college or university had met the First Circuit's requirement of statistical parity. Staying on the "sunny side" of Title IX by compliance with such statistical parity as espoused by the First Circuit should no more insulate a school from Title IX liability than statistical parity should absolve the employer involved in *Teal*. One of the central tenets of *Teal* was that Title VII protects each individual, not merely groups, from discrimination. *See Teal*, 457 U.S. at 454-56. "Every individual employee is protected" against discrimination. *Id.* at 455-56 (emphasis in original). Title IX demands no less when it states that "no person" can be deprived of the benefits of federally financed educational programs. The insidious nature of a "bottom line" approach is contrary to Title VII and Title IX, regardless of whether used to establish liability or a defense.

In short, the First Circuit has transformed Title IX from a statute of equal opportunity into a statute of equal result. Compliance can be achieved only by assuring that there are no differences in results, working to eliminate any differences in results, or assuring that no member of the underrepresented group has a reason to complain, *i.e.* their interests have been fully accommodated. Under this approach, men's and women's athletic interests need not be equally accommodated. Any differences in athletic interests are deemed irrelevant because, in the First Circuit's view, it would undermine the First Circuit's perception of the purpose of Title IX, increasing the participation rates of women athletes. App. 34a-35a.

While increasing the participation ratio of women athletes may be a laudable goal, Congress chose only to ban discrimination "on the basis of sex." The statute clearly so states. If Title IX is not confined to sex discrimination, *i.e.* judgments made by educational administrators "on the basis of sex," courts will become embroiled in reviewing what are essentially educational decisions, *i.e.* what programs to offer. Like business decisions under Title VII, educational decisions under Title IX should be free of judicial review unless they are made on the basis of sex. The First Circuit's decision represents an unwarranted intrusion upon educational decisionmaking without requiring that any differences in treatment be "on the basis of sex." If other explanations for any statistical imbalance, such as varying levels of interest, cannot be considered, Title IX becomes nothing more than a government-mandated quota. Differences in results, differences in the bottom line, do not necessarily equal differences in treatment on the basis of sex.

The Issues Presented By This Petition Are Of Exceptional Importance And Have Far Reaching Implications For Title IX Enforcement.

In addition to the fundamental nature of the issue presented here, the implications to students and educational institutions merit review at this time. Athletic programs take years to establish. A viable athletic program simply cannot be created overnight. It requires recruiting talented athletes at lower levels of the educational process. It requires decisions by talented athletes about where to matriculate, frequently on the basis of the prior success of a given athletic program. It requires adequate facilities and equipment, which may need to

be constructed. It requires the proper training and conditioning of athletes. It requires a proper coaching staff. In short, the build up of an athletic program, whether for men or women, takes time.

In contrast, the athletic "life expectancy" of the students for whom these programs are established is quite limited. The typical college athlete has a short time upon the stage of college athletics. Eligibility for college athletics is generally restricted to no more than four years of competition. Injuries, other pursuits, and competition for available roster spots may materially shorten the typical four-year window of athletic opportunity.

In this context of long lead times and short periods of opportunity, it is important that educational institutions have guidance on a fundamental question such as is presented here.

If this Court decides to let the debate percolate, educational administrators will have to decide whether to comply with the First Circuit's and the OCR's new definition of discrimination. At present, few athletic programs provide the parity between female enrollment and female varsity athletic participation set forth in the First Circuit's and latest OCR's definition of Title IX discrimination. The establishment of viable female athletic programs will require long lead times. Resources will have to be found for these programs, in some cases through the dismantling of male athletic programs. If years from now, this Court decides that the First Circuit's analysis was in error, considerable disruption and lost opportunities for students of both sexes will have occurred.

In addition to the difficulties presented by the long lead times to establish viable athletic programs and the short careers of college athletes, consideration now is desirable because of the way in which these Title IX cases are adjudicated. In most cases, the plaintiffs seek injunctive relief at an early stage of the proceeding. District courts, recognizing that the issue for a college athlete may be moot by the time an ultimate decision is rendered, frequently entertain such requests for injunctive relief. As a practical matter, the preliminary injunction hearings may be the "whole ball game." Indeed, this is exactly what happened in this case. Similarly, even if relief is ordered, the situation may change as the litigation progresses, necessitating that the trial courts revisit any injunction issued. *See, e.g., Favia v. Indiana Univ. of Pa.*, 7 F.3d 332 (3d Cir. 1993) (not an abuse of discretion for the district court to refuse to modify preliminary injunction when four of six female gymnasts who sought injunction graduated and proposed modification, dropping female gymnastics and starting female soccer team, would increase overall female participation). Delicate questions as to the scope and nature of relief are present and lower courts will need to be careful that they not micro-manage college athletic programs. *See, e.g., Roberts v. Colorado State Bd. of Agriculture*, 998 F.2d 824 (10th Cir.), *cert. denied*, 510 U.S. 1004 (1993) (district court exceeded its authority in demanding that softball team play fall exhibition schedule). The fact that these cases are often decided at the preliminary injunction stage and the delicate balancing questions that district courts will face in administering Title IX necessitate that this Court establish guidance on this core issue under Title IX, the definition of discrimination.

CONCLUSION

Throughout the modern era of civil rights litigation, this Court has been required to answer some fundamental questions on what our civil rights statutes mean. This case presents one of those fundamental questions. The issue is not procedural; it is substantive. It is, in fact, the very concept of what is meant under Title IX when Congress forbade discrimination on the basis of sex.

The approach taken by the First Circuit, proportionality, presents significant difficulties. Primarily, it fails to recognize that other innocent causes, most notably varying levels of interest in varsity athletics between men and women, might be an explanation for the lack of proportionality. The First Circuit's refusal even to allow consideration of evidence on varying levels of interest illustrates why this case is not merely an argument over one school's compliance with Title IX. The First Circuit and the OCR in its January 1996 reinterpretation of Title IX have fundamentally changed Title IX. As Chief Judge Torruella explained in his dissent, "Title IX is not an affirmative action statute but ... that is exactly what the district court has made of it." App. 76a. Failure to meet some numerical test should not establish an unrebuttable Title IX violation. The issues involved are more complicated than that. Moreover, the First Circuit's approach is a stark departure from this Court's holdings in other civil rights litigation.

On such a fundamental question as is presented in this case, only this Court can provide the necessary guidance. At its essence, this case requires a definition of Title IX's core issue: what is discrimination "on the basis of sex"?

This case presents the question squarely. The record below is well developed. The legal issues have been thoroughly explored by the opposing opinions in the Court of Appeals. The issue is not going to go away. It is a fundamental issue because the First Circuit's opinion has drastically changed the meaning of Title IX and because the OCR's adoption of the First Circuit's opinion has impacted every college and university in the country. This case presents the right opportunity for this Court to make sure that Title IX has the impact upon higher education which Congress intended. Accordingly, amici respectfully submit that this Court should review this matter and grant the Petition for Writ of Certiorari.

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAR 21 1997
CLERK

No. 96-1321 (7)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

BROWN UNIVERSITY, *et al.*,
Petitioners,
v.
AMY COHEN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF *AMICI CURIAE*, HON. J. DENNIS HASTERT OF ILLINOIS, JOHN A. BOEHNER OF OHIO, JACK KINGSTON OF GEORGIA, BILL McCULLOM OF FLORIDA, TOM DELAY OF TEXAS, MICHAEL D. CRAPO OF IDAHO, JOHN SHIMKUS OF ILLINOIS, THOMAS W. EWING OF ILLINOIS, AND OTHER MEMBERS OF CONGRESS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1321

BROWN UNIVERSITY, *et al.*,
Petitioners,

v.

AMY COHEN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

BRIEF OF *AMICI CURIAE*, HON. J. DENNIS HASTERT OF ILLINOIS AND OTHER MEMBERS OF CONGRESS IN SUPPORT OF PETITIONERS

Amici Curiae respectfully pray that this Court grant review in this case. *Amici* have obtained consent from all parties to file this brief. Correspondence evidencing consent has been provided to the Clerk of this Court.

INTEREST OF *AMICI CURIAE*

The Honorable J. Dennis Hastert and other Members of Congress have an interest in the issues presented because, as Members of Congress, their duties include drafting new legislation, amending current legislation and overseeing the administrative agencies in their interpretation and execution of legislation.

The *Amici* raise issues of concern to them, which include the manner in which courts and administrative agencies interpret legislation. The decision of the Court of Appeals for the First Circuit, together with decisions from other Courts and opinions and interpretations from the Executive Branch demonstrate that there are significant unresolved issues regarding the meaning of Title IX of the Educational Amendments of 1972, 20 U.S.C. §§ 1681-1688 ("Title IX") and the amount of deference which should be paid to administrative agencies in the interpretation of that statute.

The Petition raises issues under the Constitution which have been left unresolved by this Court and which could be resolved here. The unresolved issues have resulted in significant differences of opinion. Resolution of those unresolved issues would clarify the parameters of constitutional prohibitions for both Congress and the Executive.

This Court could resolve the case by deciding any one of the questions presented here. By doing so, this Court would resolve issues that affect Congress in both its legislative function and in its oversight function.

STATEMENT OF THE CASE

The instant case is about far more than whether Brown University may eliminate women's intercollegiate gymnastics and volleyball teams. This case raises several issues of national importance.

The case is about the meaning of an Act of Congress affecting all colleges and universities in this country. At issue is whether an interpretation of that Act made by an administrative agency can be sustained as a matter of statutory construction and constitutional civil rights. The case also presents the issue of the appropriate level of deference to be given to an administrative interpretation, and the appropriate reading of that interpretation.

SUMMARY OF ARGUMENT

At issue in this case is the appropriate construction of Title IX. Brown University is alleged to have violated the Act and discriminated against women in the conduct of its intercollegiate athletic program because the proportion of women to men participating in intercollegiate athletics is not the same as the proportion of women to men in the undergraduate population. Brown has defended on the grounds that the proportion of women to men who are participating is consistent with the proportion of women to men who are interested in participating.

The so-called "proportionality" rule that uses the undergraduate population as the standard arises from a Policy Interpretation promulgated by the Office for Civil Rights of the Department of Education. The "proportionality" standard contained therein is used as a "safe-harbor." In other words, the Office for Civil Rights states that it will not prosecute an institution if it has met the "proportionality" standard.

Several Circuit Courts, including the First Circuit in the *Cohen* decision, have considered the issue and have given the "proportionality" rule the force of a regulation as if it had been promulgated by the Agency as an interpretation and an affirmative requirement of Title IX. One District Judge, Judge Doherty in *Pederson v. Louisiana State University*, 912 F.Supp. 892 (M.D.La. 1996), together with the dissenting Judge in the *Cohen* decision, Chief Judge Torruella, have criticized the "proportionality" standard.

The case, if heard by this Court, would permit the Court to consider and pass on many issues that bear directly on the authority of Congress and the Executive in the areas of affirmative action, agency authority and statutory construction.

These *Amici* request that this Court grant the Petition and consider the issues presented. In so doing, these

Amici request that this Court resolve certain questions regarding statutory construction, the appropriate deference to be given to an administrative enforcement policy and constitutional issues left open by recent decisions relating to discrimination and affirmative action.

REASONS FOR GRANTING THE WRIT

The Petitioner's Petition for Certiorari presents an opportunity for this Court to resolve important issues regarding the construction of Title IX of the Educational Amendments of 1972, the process of statutory construction, and the deference to be paid to an administrative agency's enforcement policies. The Petition also presents constitutional issues regarding affirmative action plans left unresolved by this Court's decision in *Adarand Constructors v. Pena*, ——U.S.——, 115 S.Ct. 2097 (1995).

These *Amici* make no argument as to the merits of the case. Rather, they ask that this Court grant the Petition for the purpose of resolving issues that affect not only Congress and the Executive, but also the operation of virtually all of the colleges and universities in this country and the lives of many student-athletes affected by the interpretation placed on Title IX.

The issues addressed by the Petition are important to Congress because they affect not only the ability of Congress to legislate in important spheres but also the authority of administrative agencies to act under a delegation of power. Therefore, as members of Congress, the *Amici* here ask that this Court grant the Petition for Certiorari.

The history of Title IX and the promulgation of the regulations has already been recounted in the published decisions. The issues here, however, do not arise out of the statute or the regulations, but out of the Policy Interpretation. It is that Policy Interpretation that provides the basis of the claim below that the Act requires a policy of "proportionality." See 44 Fed. Reg. 71,418 (1979).

Brown University challenges the validity of the Policy Interpretation. The Plaintiffs assert that it is a valid exercise of administrative interpretation.

These *Amici* request that this Court review the matter because, no matter which way this Court rules, the underlying issues are important to Congress. While these issues remain unresolved, colleges and universities across the country feel compelled to take actions they might not otherwise take.

These *Amici* are painfully aware that the actions taken by college administrators have a very human cost. As colleges seek to respond to federal regulators and threats of private-party lawsuits, they restrict participation in some athletic programs by setting a limit on the number of student-athletes who can participate. In addition, they feel compelled to eliminate other athletic programs. Each program capped or eliminated represents lost opportunities for student-athletes. While the issues presented here remain unresolved, the cost in terms of lost opportunities will continue. Regardless of the specific obligations that may or may not be imposed on educational institutions in meeting the objectives of the statute, the intent of Title IX was not to restrict opportunities for any group of student-athletes. The current uncertainty as to interpretation, however, produces that very effect.

By resolving the issues presented, this Court can mitigate the human cost and permit colleges to administer their athletic programs for the benefit of athletes, not lawyers and regulators.

I. BY GRANTING THE PETITIONER'S PETITION THIS COURT CAN RESOLVE ISSUES INVOLVING THE CONSTRUCTION OF TITLE IX AND THE DEFERENCE TO BE GIVEN AN AGENCY'S POLICY INTERPRETATION.

At issue is a matter of statutory construction. Was it the intent of Congress to impose a rule under which a lack of "proportionality" constitutes discrimination in inter-collegiate athletics?

Leaving aside the issue of whether such a rule would be constitutionally permissible, various lower courts have determined that that was precisely the intent of Congress. As evidence of that intent, the lower courts have looked not to the language of the Act, not to statements of Members of Congress, not to fully promulgated regulations of the Department of Education, but to an interpretive policy used for enforcement purposes by the Office for Civil Rights to the effect that if a college maintains "proportionality" it will not be charged with discrimination. Some lower courts have stated that such a policy of an administrative agency charged with enforcement of the Act is entitled to deference as to the meaning of the Act and as to the intent of Congress. See *Cohen v. Brown University*, 991 F.2d 888, 896-97 (1st Cir. 1993) (Cohen II), *Cohen v. Brown University*, 101 F.3d 155, 173 (1st Cir. 1996) (Cohen III), *Kelly v. Board of Trustees*, 35 F.3d 265 (7th Cir. 1995) cert. denied, 115 S.Ct. 938 (1995). At least one other court has held the policy is not entitled to deference in determining the intent of Congress. *Pederson v. Louisiana State University*, 912 F.Supp. 892, 914 (M.D.La. 1996).

These *Amici* request that this Court grant the Petitioner's Petition in order to review that analysis. Whether the power of determining Congressional intent should be held by enforcement officers in the various agencies and departments of the Executive Branch is a significant statutory construction issue.

A. Whether an Enforcement Policy Is Entitled to the Same Deference as a Regulation.

In the case below, the First Circuit held that the Policy Interpretation is entitled to deference because it was issued by the agency that issued the regulations, which regulations were issued pursuant to the Administrative Procedure Act. The Interpretation was, therefore, given deference as an indication of the intent of the Agency in issuing its regulations, which regulations were given deference as an indication of Congressional intent.

The question of whether an enforcement policy of an administrative agency should be given deference in determining the intent of Congress has come up before in different contexts. In *Batterton v. Francis,* 432 U.S. 416, 425 n.9 (1977), this Court pointed out the difference between the weight to be given to substantive regulations and the weight to be given to policy interpretation in determining the intent of Congress. This Court said:

> Legislative, or substantive, regulations are "issued by an agency pursuant to statutory authority and which implement the statute, as, for example, the proxy rules issued by the Securities and Exchange Commission . . . . Such rules have the force and effect of law." U.S. Dept. of Justice, Attorney General's Manual on the Administrative Procedure Act 30 n.3 (1947). See *United States v. Mersky,* 361 U.S. 431, 437-438, 80 S.Ct. 459 4 L.Ed.2d 423 (1960); *Atchison, T.&S.F.R. Co. v. Scarlett,* 30 U.S. 471, 474, 57 S.Ct. 541, 81 L.Ed.2d 748 (1937).
>
> By way of contrast, a court is not required to give effect to an interpretive regulation. Varying degrees of deference are accorded to administrative interpretations, based on such factors as the timing and consistency of the agency's position, and the nature of its expertise. See *General Electric Co. v. Gilbert,* 429 U.S. 125, 141-145, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976); *Morton v. Ruiz,* 415 U.S. 199, 231-237,

94 S.Ct. 1055, 39 L.Ed.2d 270 (1974); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944).

In this case, the issue is unresolved as to whether the Policy Interpretation is an "interpretive regulation" or a "substantive regulation." Interpretive regulations, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore v. Swift & Co.*, 323 U.S. at 140. However, "[t]he weight of such a judgment in a particular case will depend upon the thoroughness of evidence in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.* In *Skidmore*, this Court held that the regulation was interpretive and rejected the interpretations as being controlling.

B. Whether a "Safe Harbor" Regulation Should Be Interpreted as Creating an Affirmative Obligation.

Here, the interpretation at issue is, apparently, an exercise of prosecutorial discretion. The Department is exercising its discretion not to prosecute those institutions that lie within the "safe harbor" of prongs one, two or three. Prosecutorial discretion is an important function of the Executive in our system of separation of powers.

Whether such a Policy Interpretation can create substantive rights against all parties not inside the "safe harbor" is an issue important to these *Amici*. In other words, if an agency develops a "safe harbor" is everyone required to sail into it? If someone does not take advantage of it is there a violation of the law?

The issue impacts other cases involving "safe harbor" regulation. Here the "safe harbor" creates a shield. Its purpose was to limit government prosecution to those

institutions outside the shield. If its effect can be to create substantive rights which may be used by private parties against all institutions outside the shield, then these *Amici* and all of Congress will have to scrutinize "safe harbor" regulations more closely.

The Policy Interpretation at issue here provides three "safe harbors" which colleges can use to stay "on the sunny side of Title IX." See *Brown II*. The "safe harbors" are a shield for colleges. Here, the failure to find a "safe harbor" has been used as a sword by the plaintiffs.

These *Amici* request review of this matter to determine whether a "safe harbor" creates affirmative obligations. If, as a matter of construction of the regulations and the underlying legislation, "safe harbors" create affirmative obligations, then these *Amici,* and Congress as a whole, would be obliged to carefully scrutinize and oversee other regulatory actions in which "safe harbors" have been created. Such "safe harbors" are common in the enforcement of the Securities Acts, the Internal Revenue Code and the Antitrust Laws. Congressional oversight would have to be enhanced if those "safe harbors" were to create private, substantive, affirmative rights, swords, as well as shields from government prosecution. In fact, Congress may be reluctant to delegate authority to create "safe harbors".

C. Whether an Agency Interpretation Creating Gender-Based Classifications Is Entitled to Deference.

The Circuit Courts have given deference to the Policy Interpretation even though it creates gender-based classifications. However, in *United States v. Commonwealth of Virginia,* —— U.S. ——, 116 S.Ct. 2264 (1996), this Court held that a state agency's creation of gender-based classifications was not entitled to deference. The unresolved issue is whether *Commonwealth of Virginia* means that no deference is to be given to an agency's creation

of a classification, or whether there is to be a different standard for federal agencies than there is for state agencies.

The Executive Branch is, apparently, equally perplexed about the deference to be given to Congress. The Department of Justice Office of Legal Counsel stated that one of the issues left unresolved after this Court's decision in *Adarand* was "what deference the judiciary should give to determinations by Congress that affirmative action is necessary to remedy discrimination." Legal Guidance on the Implications of the Supreme Court's Decision in Adarand Constructors, Inc., 19 U.S. Op. OLC ———, 1995 Westlaw 835775 (June 28, 1995).

Resolution of these issues will impact Congress' ability to legislate and its decisions to delegate authority to federal agencies as well as the level of supervision and oversight required by Congress.

II. BY GRANTING THE PETITION THIS COURT CAN RESOLVE THE ISSUE OF WHETHER TITLE IX IS TO BE CONSTRUED AS ANALOGOUS TO THE CASES ARISING UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964.

Several Circuit Courts have decided cases under Title IX of the Educational Amendments Act. Although the Act itself is facially similar to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, the issue of whether to apply the reasoning and the case law that arose under Title VII to cases arising under Title IX remains unresolved in non-employment cases. The question was left open by this Court in *Franklin v. Gwinnett County Public School*, 503 U.S. 60, 65 n.4 (1992).

In 1993, the Tenth Circuit held that Title VII case law under the theory of unintentional discrimination, or "disparate impact", provides the most "appropriate analogue" for cases arising under Title IX. *Roberts v. Colorado*

State Board of Agriculture, 998 F.2d 824, 832-833 (1993). In 1994 the Second Circuit held that Title VII precedent was generally applicable. *Yusif v. Vassar College,* 35 F.3d 709, 714-715. Other Circuits dealing with similar issues under Title IX did not speak to the issue of the application of Title VII analysis. See, *Favia v. Indiana University of Pennsylvania,* 7 F.3d 332 (3d Cir., 1993), *Kelley v. Board of Trustees,* 35 F.3d 265 (7th Cir. 1994), *cert. denied,* 115 S.Ct. 938 (1995).

However, in the decision below the First Circuit rejected the analogy to Title VII cases. The First Circuit stated:

> It does not follow from the fact that 1681(b) was patterned after a Title VII provision that Title VII standards should apply to a Title IX analysis of whether an intercollegiate athletics program equally accommodates both genders . . . . 101 F.3d at 154-155.

Thus, the First Circuit below accepted the rationale of *Roberts,* permitting a claim for unintentional discrimination, but rejecting the safeguards built up by Title VII for unintentional discrimination.

Title VII provides a wealth of case law from this Court and the lower courts regarding what is necessary to prove a claim of intentional and unintentional discrimination. Case law under Title VII provides the elements of a *prima facie* case, *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973); provides the elements of a case of disparate impact, *Griggs v. Duke Power Co.,* 401 U.S. 414 (1971); provides guidelines for the use of statistical evidence, *Hazelwood School Dist. v. U.S.,* 433 U.S. 299 (1977); provides the basis for employer defenses, *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989); and the bases for disproving such defenses as pretexts, *St. Mary's Honor Center v. Hicks,* 509 U.S. ——, 113 S.Ct. 2742

(1993); provides the analysis for determining who has the burden of going forward with the evidence and the burden of persuasion, *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981); and even provides when a remedial affirmative action plan may be permissible in gender and race-related cases, *United Steelworkers v. Weber*, 443 U.S. 193 (1979) and *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616, 638-40 (1987).

These *Amici*, as members of Congress, look to judicial construction of similar statutes when enacting subsequent legislation. Congress considers a well-developed body of caselaw as an indication of how courts will act in the future. Here, some lower courts have rejected well-developed analysis where the underlying statutes are virtually identical. Some have incorporated the analysis. As a result, these *Amici* request that this Court grant the Petitioner's Petition in order to resolve the issue of the applicability of the case-law under Title VII.

III. BY GRANTING THE PETITION THIS COURT CAN CLARIFY WHETHER PROPORTIONALITY IS A GENDER-BASED CLASSIFICATION.

Following this Court's holding in *Adarand* several questions remain unresolved. The question arises in this case in the context of whether the "proportionality" standard constitutes a preference.

The First Circuit ruled below that it is not a preference but a remedy. The Seventh Circuit, in *Kelley*, ruled that the "proportionality" standard creates a "gender-based classification system" that "passes constitutional muster because it directly protects the interest of the disproportionately burdened gender . . . ." 35 F.3d at 272. The court held that "proportionality" created a preference but the preference was justified. The District Court for the Middle District of Louisiana stated that the Act itself prohibits

"preferential or disparate treatment" and that the "proportionality" standard therefore violates the clear meaning of the Act. *Pederson v. Louisiana State University*, 912 F. Supp. at 914 (1966).

The Department of Education has taken the position that the standard does not create a gender-based classification because the Policy Interpretation provides means other than "proportionality" to meet its test. (Clarification of Intercollegiate Athletics Policy Guidance, Department of Education, Office for Civil Rights, (1995)). The dissenting opinion in the *Cohen* decision below, however, would find that the so-called second and third prongs are either illusory or exacerbate the effect of the first prong. *Cohen III*, 101 F.3d at 195-97.

The terms "preference" or quota" have become shibboleths in both public and legal discourse. Even the First Circuit below termed Brown University's argument that "proportionality" was an affirmative action program a "talismanic incantation." 101 F.3d at 170.

In the decision below, the First Circuit held that the "proportionality" standard is not an affirmative action plan, a preference or a quota because it is not a voluntary plan adopted "to remedy discrimination . . . by means of specific group-based preference or numerical goals, and a specific timetable for achieving those goals." 101 F.3d at 170. (citing *Adarand*) Rather, the First Circuit held that Title IX is an anti-discrimination statute. The court then likened its enforcement of "proportionality" to school desegregation cases where discrimination had been proved. The court ruled that because Brown had not met the "proportionality" standard in the first place, it was guilty of discrimination, without more. Since discrimination had been proved, the First Circuit reasoned that *Adarand* did not apply. 101 F.3d at 170-171. The dissent argues that the "proportionality" standard does, in fact, create a preference.

These *Amici* do not comment on whether the First Circuit's reasoning is circular and do not argue that the analysis of the dissenting Judge is meritorious. Rather, these *Amici* request that this Court grant the petition to consider whether the "proportionality" standard is a preference, or whether a failure to achieve "proportionality" is, itself, proof of discrimination.

Deciding this case will help give life to the almost meaningless terms "preference" or "quota", and will help define the parameters of coverage of *Adarand* and *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989). Both Congress and the Executive will more readily be able to determine whether and to what extent their actions will be held to be unlawful preferences or merely remedial determinations based on specific findings. The *Amici*, therefore, urge this Court to grant this petition in order to resolve basic issues regarding what is a preference or set-aside program and what is a remedial decree based on findings of discrimination.

IV. BY GRANTING THE PETITION, THIS COURT CAN RESOLVE WHAT REQUIREMENTS APPLY TO GENDER-BASED CLASSIFICATIONS IN LIGHT OF *COMMONWEALTH OF VIRGINIA*.

This Court's decision in *Adarand* resolved several issues regarding race-based affirmative action programs. The issue of whether and to what extent *Adarand* applies to gender-based classifications was left open. Subsequently, in *Commonwealth of Virginia*, this Court required that gender-based classifications must have an "exceedingly persuasive justification." 518 U.S. ——, 116 S.Ct. 2264, 2275-2276 (1996). Both issues could be resolved by this Court by granting the Petitioner's Petition for Certiorari here.

The lower courts have struggled with the issue of whether *Adarand* should apply to gender-based affirmative action plans. The Sixth Circuit has held that gender-based

affirmative action programs are to be analyzed in the same manner as race-based programs. *Conlin v. Blanchard*, 890 F.2d 811, 816 (6th Cir. 1989); see also, *Brunet v. City of Columbus*, 1 F.3d 390, 404 (6th Cir. 1993), cert. denied, 114 S.Ct. 1190 (1994). Other Circuits have held otherwise. See, *e.g., Ensley Brancy, NAACP v. Seibels*, 31 F.3d 1548, 1580 (11th Cir. 1994). In the case below, the First Circuit held that the focus on "exceedingly persuasive justification" in *Commonwealth of Virginia* did not change the standard used to evaluate gender-based classifications for the past 20 years.

The confusion does not end with the lower courts. The Justice Department's Office of Legal Counsel does not necessarily see eye-to-eye with the Department's own Solicitor General. On June 28, 1995, the Attorney General issued an opinion that *Adarand* had no effect on gender-based affirmative action programs. The OLC stated:

> *Adarand* did not address the appropriate constitutional standard of review for affirmative action programs that use gender classification as a basis for decision making. Indeed, the Supreme Court has never resolved the matter. However, both before and after *Croson*, nearly all circuit court decisions have applied intermediate scrutiny to affirmative action measures that benefit women. The Sixth Circuit is the only court that has equated racial and gender classifications: purporting to rely on *Croson*, it held that gender-based affirmative action measures are subject to strict scrutiny. *Conlin v. Blanchard*, 890 F.2d at 816. That holding has been criticized by other courts of appeals, which have correctly pointed out that *Croson* does not speak to the appropriate standard of review for such measures. Legal Guidance on the Implications of the Supreme Court's Decision in Adarand Constructors, Inc. v. Pena, U.S. Department of Justice, Office of Legal Counsel, *supra*.

The position of the Attorney General is that gender-based classification programs could continue in spite of

Adarand. However, the opinion of the Attorney General is not universally held. Even the Attorney General has argued that official discrimination based on gender should be scrutinized in the same light as discrimination based on race. Brief of United States in *Commonwealth of Virginia*. If race and gender discrimination are to be subject to the same level of scrutiny, then the rationale for refusing to apply *Adarand* to gender-based affirmative action plans is lost.

The issue of the level of scrutiny to be applied in gender discrimination cases under the Fourteenth Amendment compared with the level of scrutiny to be applied in the so-called benign discrimination setting of affirmative action plans based on gender has been left open to interpretation by lower courts and commentators. The Seventh Circuit has noted the anomaly that would exist by judging a gender-based affirmative action program by a less severe standard than a race-based program since the race-based program is designed to cure the more invidious discrimination. *Milwaukee County Pavers Ass'n v. Fiedler*, 922 F.2d 419, 422 (7th Cir. 1991).[1] The same anomaly has also been the subject of commentators for many years. See, *e.g.*, Ginsburg, Sexual Equality under the Fourteenth and Equal Rights Amendments, 1979 Washington U.L.Q. 161, 170.[2]

---

[1] *Milwaukee County Pavers* is a post-*Croson* decision. There Judge Posner raised the anomaly but did not rule on it because the State of Wisconsin waived the argument by conceding that *Croson* applied to gender-based affirmative action programs.

[2] In discussing questions left unresolved by Justice Powell's opinion in *Regents of the University of California v. Bakke* (438 U.S. 265 (1978)) Professor Ginsburg asks:

> Did Justice Powell mean law-sanctioned preferential treatment for women should be less vulnerable to challenge than preferential treatment for racial and ethnic groups saddled with "a lengthy and tragic history" of adverse discrimination?

Professor Ginsburg answers: "That seems an anomalous position."

Congress needs guidance on this issue so that it knows what action it can take regarding gender-based classifications. Granting the Petitioner's Petition here will give this court the opportunity to clarify its holding in *Adarand* and to give meaning to the language in *Commonwealth of Virginia* requiring an "exceedingly persuasive justification" for parties seeking to defend a gender-conscious exercise of government authority. Granting this Petition will help guide Congress and the lower courts in an area of constitutional interpretation, subject to debate within the other two branches of government, and, apparently, within the Executive Branch itself.

CONCLUSION

For the foregoing reasons, the *Amici Curiae* respectfully request that the Court grant certiorari in this case.

Respectfully submitted,

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No. 96-1321

Supreme Court, U.S.
FILED
MAR 21 1997
CLERK

In The

Supreme Court of the United States

October Term, 1996

BROWN UNIVERSITY, et al.,

Petitioners,

vs.

AMY COHEN, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court of Appeals For The First Circuit Case No. 95-2205

BRIEF OF *AMICUS CURIAE* COLLEGE FOOTBALL ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF AMICUS CURIAE

The College Football Association ("CFA") was formed in 1977 to improve major college football by upgrading academic standards for players, improving recruitment practices, and broadening television exposure for college teams. CFA's 69 members include all of the universities that participate in the Atlantic Coast Conference, the Big East Conference, the Big 12 Conference, Conference USA, the Southeastern Conference, the Western Athletic Conference, as well as independent schools such as Notre Dame and the Military and Naval Academies.

CFA and its members share a commitment to fulfill the mandate of Title IX, 20 U.S.C. §§ 1681-1688, by expanding athletic opportunities for women and enabling women – as well as men – to develop their full potential in athletics. CFA recognizes, however, that college football is at the heart of the dilemma created by the judgment of the United States Court of Appeals for the First Circuit in this case.

The Court of Appeals interpreted Title IX to require participation by men and women in varsity athletic programs in statistical proportion to their enrollment. If an institution has an equal number of men and women in the student body, the court's ruling means that the institution must have equal numbers of male and female participants in varsity athletics. That might be achievable – but for football. There is no sport for women comparable to football. The easiest solution – one that is consistent with Title IX – is to exempt football from the

opportunities for participation that are counted in determining proportionality.

Intercollegiate football is unique among sports: the size of the teams and the revenue the teams produce distinguish football from other sports, both men's and women's. The Court of Appeals' interpretation of Title IX requires universities either to expend scarce resources on additional intercollegiate teams for women or to eliminate existing intercollegiate teams for men. Eliminating football, at least at CFA member schools, is not a likely solution because the revenue from football supports all other sports and the traditional goodwill generated by football attracts alumni contributions to all programs within a university.

Amicus CFA files this brief to describe its view of the flaws in the Court of Appeals' analysis and to explain the negative consequences of that analysis for all students at CFA member institutions.

ISSUE ADDRESSED

Whether a university violates Title IX when it takes the nature of particular sports into account and accommodates the athletic interests and abilities of male and female students equally effectively even though men and women do not participate on the university's varsity teams in proportion to their enrollment.

REASONS FOR GRANTING THE PETITION

I. The Ruling Below.

The Court of Appeals acknowledged that it is "unlikely" that "the athletic establishments of many coeducational universities reflect the gender balance of their student bodies." *Cohen v. Brown University* ("*Cohen II*"), 991 F.2d 888, 898 (1st Cir. 1993); Pet. App. 189a. It also acknowledged that "in an era of fiscal austerity, few universities are prone to expand athletic opportunities." *Id.* Nevertheless, the Court ruled that a claim of unlawful sex discrimination can be made under Title IX if the plaintiff shows "disparity between the gender composition of the institution's student body and its athletic program" and that "the underrepresented gender has not been 'fully and effectively accommodated by the present program.' " 991 F.2d at 901-02; Pet. App. 189a. The Court's ruling was based on a three-part test in a "Policy Interpretation" issued by the Department of Health, Education and Welfare (now the Department of Education) in 1979. 45 C.F.R. Part 86 (1979).

According to the Court, if a school does not meet the proportionality requirement, it "must fully and effectively accommodate the underrepresented gender's interests and abilities, even if that requires it to give the underrepresented gender (in this case, women) what amounts to a larger slice of a shrinking athletic-opportunity pie." *Cohen II*, 991 F.2d at 906; Pet. App. 198a. The Court noted that compliance with Title IX may be

achieved "by reducing opportunities for the overrepresented gender." *Id.* at 899 n. 15; Pet. App. 183a.[1]

Cohen II affirmed the entry of a preliminary injunction requiring Brown University to provide university-funded women's gymnastics and volleyball teams. Brown had also cut – for financial reasons – university-funded men's golf and water polo teams; the injunction did not restore those teams. After trial on the merits, the majority of a different First Circuit panel adhered to the legal test developed at the preliminary injunction stage of the case. *Cohen v. Brown University* ("*Cohen IV*"), 101 F.3d 155 (1st Cir. 1996).

II. The Impact of the Ruling Below.

The legal test in *Cohen II* will have a dramatic impact on all men's sports, including football. Despite the expansion of women's athletic programs after Title IX's passage in 1972, women continue to participate in varsity, club and intramural sports far less often than do men. To meet a proportionality requirement, a university must either induce more women to participate in sports in order to accommodate the numbers of men who are eager to be part of a competitive sports program or reduce the number of intercollegiate sports opportunities for men.

---

[1] Relying on *Cohen II*, 991 F.2d at 898, another appellate court ruled that the University of Illinois could eliminate its men's swimming program without violating Title IX because men's participation in athletics – even after the elimination of the swim team – would "continue to be more than substantially proportionate to their presence in the University's student body." *Kelley v. Board of Trustees*, 35 F.3d 265, 270 (7th Cir. 1994).

Given limited financial resources, universities are more likely to reduce the sports opportunities for men. Participation by men in intercollegiate athletics decreased by 5.7% between 1984 and 1994, a result of financial limitations at universities and colleges throughout the country. NCAA Participation Statistics Report, 1994.

Not surprisingly, college programs reflect the participation rates at the high school level – about 62% male and 38% female.[2] The Sports and Recreational Programs of the Nation's Universities and Colleges, NCAA Report Number 8 and The National Federation of State High School Associations Survey Data, 1994. Two million girls play on high school teams, compared with 3.4 million boys. State High School Associations Survey Data, 1994. The number of slots on intercollegiate teams at National Collegiate Athletic Association ("NCAA") institutions is about 295,000. NCAA Participation Statistics Report, 1994. If participation rates remain the same from high school to college, only one in 18 high school athletes will participate in intercollegiate athletics. If, however, women are entitled to about half of the NCAA slots, based on their proportion in the college population,[3] one

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[2] Three times as many men as women play intercollegiate club sports, and eight times as many men as women play on college intramural teams. NCAA Gender Equity Study, Summary of Results, March 1992, and CFA Participation Survey, July 1994.

[3] Not all student bodies are approximately half male and half female. Georgia Tech's student enrollment is 75% male and 25% female. The University of North Carolina has a student population that is 42% male and 58% female.

in 14 female high school athletes will participate in intercollegiate athletics compared with one in 23 male athletes.

Reduction of athletic opportunities for men may be accomplished either by reducing the size of men's teams or by reducing the number of men's teams. More likely, a decrease in athletic opportunities for men will reduce the number of men's teams because men's teams on average are larger than women's. Football teams are the largest teams in intercollegiate athletics. The average football squad at the NCAA Division 1-A level has 117 members.[4] The next largest men's teams in Division 1 are lacrosse, with an average of 39 members, track and field with 36, and baseball with 34. NCAA Gender Equity Study, Summary of Results, March 1992. The largest women's teams in Division 1 are lacrosse, with an average of 27 members, and track and field, with an average of 25. *Id.*

Although *Cohen II* may result in the elimination of some football teams – or their reduction in size – it is unlikely that football will be eliminated at CFA member schools. Football provides the revenue that supports the other athletic programs. According to the CFA's most recent financial survey for the 1994-95 academic year, football was responsible for 63 percent of the total revenue generated to fund a member's athletic program. Men's basketball generated an additional 20 percent of an athletic department's revenue. Revenue from women's

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[4] Approximately 50 team members play in a game; the team members who do not regularly play in scheduled games play as the "scout team" at all practices, providing opponents for the specialized "starting teams" and gaining experience for future competitive play.

sports was less than one percent of the total income, an average of approximately $90,000 per member. Average operating costs for women's sports were $1.9 million.

Football revenues are crucial to college athletic programs, and successful football programs produce increased alumni contributions for a broad range of university programs. Instead of eliminating football, universities are more likely to eliminate a number of other men's teams to compensate for the size of football teams.

III. The Governing Statute, Regulations and Policy Interpretation.

The legislative history of Title IX reflects the unique position of football in intercollegiate athletics. Title IX of the Education Amendments of 1972 provides:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

20 U.S.C. § 1681(a). The Javits Amendment to Title IX, adopted by Congress in 1974, further provides:

> The Secretary of [HEW] shall prepare and publish . . . proposed regulations implementing the provisions of Title IX of the Education Amendments of 1972 relating to the prohibition of sex discrimination in federally assisted education programs *which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports.*

Pub. L. No. 93-380, 88 Stat. 612 (1974) (codified at 20 U.S.C. § 1681 note) (emphasis added). Congress adopted

section 844 after the Conference Committee deleted a Senate floor amendment that would have exempted revenue-producing athletics from Title IX. 45 C.F.R. Part 86, 44 Federal Register at 71,413.

The regulations that Congress directed in 1974 provide as follows:

> (a) *General.* No person shall, on the basis of sex, be excluded from participation in . . . any interscholastic, intercollegiate, club or intramural athletics offered by a recipient. . . .
>
> (b) *Separate teams.* Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose of major activity of which involves bodily contact.
>
> (c) *Equal Opportunity.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors

> . . . Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes. . . .

34 C.F.R. § 106.41 (1995).

The three-part test that provides the basis of the Court of Appeals' ruling does not appear in Title IX or its implementing regulations. Instead, it is a relatively brief part of a lengthy Policy Statement promulgated by HEW's Office for Civil Rights in 1979. The Policy Statement describes the three-part test as follows:

> 5. In effectively accommodating the interests and abilities of male and female athletes, institutions must provide . . . the opportunity for individuals of each sex to participate in intercollegiate competition. . . .
>
> a. Compliance will be assessed in any one of the following ways:
>
> (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
>
> (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or

> (3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

44 Fed. Reg. 71,413 (Dec. 11, 1979). The three-part test – considered in isolation by the Court of Appeals – does not refer to the nature of particular sports.

IV. The Legal Standard Applied by the Court of Appeals Is Irreconcilable with Title IX and the Implementing Regulations, Which Require that a University Take the Nature of Particular Sports into Account When It Accommodates the Athletic Interest and Abilities of Male and Female Students Equally Effectively.

The Court of Appeals' legal analysis is not supported by the language or purpose of Title IX or the implementing regulations. Title IX requires universities to equally accommodate the athletic interests of both men and women. Title IX does not require universities to provide representation of men and women on varsity teams in statistical proportion to enrollment. The Court of Appeals, however, in effect mandated numerical equivalence and concluded that whenever there is statistical imbalance, the university must fully accommodate all athletic interests and abilities of women, regardless of the

impact that accommodation may have on other university programs.

Relying on § 106.41(b) of the regulations implementing Title IX, the dissenting judge in *Cohen IV* suggested that the simplest way of resolving the problems that arise from the Court's legal analysis would be to allow exclusion of the members of a football team from the calculation of proportionality. 101 F.3d at 192-93; Pet. App. 70a-71a. Under the regulation, universities are allowed to have men's teams in contact sports without providing a matching team for women or allowing women to try out for the men's team. (In fact, of the contact sports, only football, wrestling and boxing are without corresponding women's teams.) Counting the participants in football, the contact sport that requires a large number of participants, "skews the numbers of athletic participants – making it impossible for the university to provide both men's and women's teams in other sports." 101 F.3d at 192-93, Torruella, C.J. dissenting; Pet. App. 71a.

The dissent recognizes that the Javits Amendment to Title IX directs the administering agency to take into account the nature of particular sports in assessing compliance: the agency should consider the varying number of players needed for different sports when assessing compliance with Title IX. Recognition of the fact that there is no intercollegiate sport for women that involves the large number of participants that are on a football team takes into account the nature of football. If football is taken out of the proportionality equation, it is easier and more realistic to provide intercollegiate sports participation opportunities for both men and women that are

proportionate to enrollment and that reflect student interest.

The portion of the Policy Interpretation relied upon by the Court of Appeals does not make an adjustment in the overall proportionality requirement to take into account that women are not involved in football, even though football is a key component in the overall demand for sports. The failure to exclude football from the proportionality requirement results in universities trying to induce women to participate in sports, not so that they will benefit, but in order to be able to accommodate men who are eager to be part of a competitive sports program.

The *Cohen II* Court's interpretation of the three-part test in the Policy Statement overlooked the Policy Interpretation Summary, which states: "Pursuant to the regulation, the governing principle in this area is that the athletic interests and abilities of male and female students must be *equally effectively accommodated.*" 44 Fed. Reg. 71,414 (Dec. 11, 1979) (emphasis added). Without basis in the language of Title IX, its implementing regulations or the record in this case, the Court assumed that interest and ability to participate in sports is equal as between all men and women on all campuses.

It is "more logical that interest in participation and levels of ability to participate as percentages of the male and female populations will vary from campus to campus and region to region and will change with time." *Pederson v. Louisiana State University*, 912 F. Supp. 892, 913-14 (M.D.La. 1996). Allowing each university or college to equally effectively accommodate the athletic interests of male and female students prevents interference with the

freedom of academic institutions to choose their mix of students, to control the emphasis they wish to place on particular sports, and to foster a learning experience for all students.

CONCLUSION

The United States Court of Appeals for the First Circuit has misinterpreted Title IX and its implementing regulations. Title IX does not mandate numerical proportionality. Rather, it requires equal opportunity to participate in intercollegiate athletics for both sexes. Equal opportunity to participate is to be assessed not in a rote numerical fashion, but in a common sense fashion – by taking into account the nature of a sport and the athletic interests and abilities of male and female students. The Court's decision creates the legal and practical problems described in Brown's Petition for Writ of Certiorari and has negative consequences for all students at CFA member institutions. Therefore, amicus CFA urges the Court to grant the Petition and issue a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAR 21 1997
CLERK

No. 96-1321

IN THE

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Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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AMICI CURIAE IN SUPPORT OF BROWN UNIVERSITY'S PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Amici curiae USA Wrestling, Inc. and United States Swimming, Inc. incorporate the questions presented by Brown University in its Petition for Certiorari.

PARTIES TO THE PROCEEDING

The amici curiae to this proceeding are United States of America Wrestling Association, Inc., an Oklahoma nonprofit corporation, recognized by the United States Olympic Committee ("USOC") as the national governing body for the sport of wrestling, United States Swimming, Inc., an Ohio not-for-profit corporation, recognized by the USOC as the national governing body for the sport of swimming and United States Water Polo, a not-for-profit corporation, recognized by the USOC as the national governing body for the sport of water polo. As reflected by the attached letters, both Petitioners' counsel and Respondents' counsel have consented to the participation of these NGBs as amici curiae to this proceeding.

RULE 29.6 STATEMENT

Amici curiae, USA Wrestling, U.S. Swimming and U.S. Water Polo, are not-for-profit corporations. They have no parents or subsidiaries. However, each is a member of the USOC and of their respective international federations. Fédération Internationale de Lutte Amateur is the international federation for wrestling and Federation Internationale De Natation is the international federation for swimming and water polo. U.S. Swimming and U.S. Water Polo are also members of United States Aquatic Sports, Inc., an Ohio not-for-profit corporation.

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PETITION FOR A WRIT OF CERTIORARI

Amici curiae United States of America Wrestling Association, Inc. ("USA Wrestling"), United States Swimming, Inc. ("U.S. Swimming") and United States Water Polo, Inc. ("U.S. Water Polo") hereby join in Brown University, et al.'s request of this Court to issue a writ of certiorari to review the decision of the United States Court of Appeals for the First Circuit in this case. USA Wrestling, U.S. Swimming and U.S. Water Polo incorporate, by reference, the provisions of Brown University's petition for certiorari with regard to the opinions below and grounds for jurisdiction.

STATUTES AND CONSTITUTION PROVISIONS INVOLVED

Amici curiae USA Wrestling, U.S. Swimming and U.S. Water Polo incorporate the reference to the statutes and provisions involved as identified by Brown University in its petition for certiorari. USA Wrestling, U.S. Swimming and U.S. Water Polo also believe that this case has impact on and concerns the Amateur Sports Act of 1978, 36 U.S.C. § 371, *et seq.* (specifically, 36 U.S.C. §§ 374, 375, 391, 392 and 393).

STATEMENT OF THE CASE

Amici curiae USA Wrestling, U.S. Swimming and U.S. Water Polo incorporate those applicable provisions of Brown University's statement of the case contained in its petition for certiorari.

INTEREST OF AMICI CURIAE

Amici curiae USA Wrestling, U.S. Swimming and U.S. Water Polo are each national governing bodies ("NGB") recognized by the USOC as the NGB for their particular sports. In that role, they have a duty to promote and advance the interests of their particular sports, to enhance amateur athletic competition and to find the best athletes for amateur competition in the Olympic Games and other protected

competitions identified by the Amateur Sports Act. As a part of their programs, numerous NGBs, including USA Wrestling, U.S. Swimming and U.S. Water Polo, utilize collegiate sports programs to identify elite athletes who have the abilities and/or capabilities of being Olympic contenders. Likewise, these NGBs benefit from the sports programs of colleges and universities as a part of the training regimen for those athletes who might be qualified to have the opportunity to participate or compete for a position on the United States Olympic Team or teams sent to participate in other protected competitions.

The First Circuit's decision in this matter has had an adverse impact on the ability of these NGBs to utilize the college and university programs to identify and train athletes for Olympic competition and other protected competition under the Amateur Sports Act. Specifically, because the First Circuit has imposed a statistical equity requirement for sports programs under Title IX, wrestling programs throughout the country have been eliminated in order to reach a statistical parity between men's and women's sports programs and the student body of the institution. Likewise, swimming programs have been eliminated to meet the parity as identified by the First Circuit in order to comply with the provisions of Title IX. Further, the First Circuit's decision adversely impacts an NGB's ability to develop interest and participation throughout the United States in the sport it represents as required by the Amateur Sports Act.

REASONS FOR GRANTING THE WRIT

In addition to those reasons identified by Brown University in its petition for certiorari, which these amici curiae acknowledge and incorporate herein, USA Wrestling, U.S. Swimming and U.S. Water Polo contend that the First Circuit's interpretation of Title IX adversely impacts their duties and responsibilities as identified in the Amateur Sports Act, 36 U.S.C. § 371, *et. seq.* Therefore, the First Circuit's decision may place two federal statutes, Title IX of the

Educational Amendments of 1972, 20 U.S.C. § 1681, and the Amateur Sports Act, in conflict by eliminating these NGBs' ability to carry out their duties and responsibilities as identified by the Amateur Sports Act.

The Amateur Sports Act provides for duties and responsibilities of NGBs.[1] 36 U.S.C. § 392 provides in pertinent part:

---

[1] Pursuant to 36 U.S.C. § 374, the objects and purposes of the USOC include that it shall:

> (1) establish national goals for amateur athletic activities and encourage the attainment of those goals;
>
> (2) coordinate and develop amateur athletic activity in the United States directly relating to international amateur athletic competition, so as to foster productive working relationships among sports-related organizations; . . .
>
> (4) obtain for the United States, either directly or by delegation to the appropriate national governing body, the most competent amateur representation possible in each competition and event of the Olympic Games and of the Pan-American Games;
>
> (5) promote and support amateur athletic activities involving the United States and foreign nations;
>
> (6) promote and encourage physical fitness and public participation in amateur athletic activities;
>
> (7) assist organizations and persons concerned with sports in the development of amateur athletic programs for amateur athletes; . . . .

The USOC is also to encourage and provide assistance for amateur athletic opportunities for women, disabled persons and racial and ethnic minorities. 36 U.S.C. § 374(12)(13)(14). The NGBs derive duties and responsibilities from the USOC.

(a) For the sport which it governs, a national governing body is under duty to --

(1) develop interest and participation throughout the United States and be responsible to the persons and amateur sports organizations it represents; . . .

(6) provide equitable support and encouragement for participation by women where separate programs for male and female athletes are conducted on a national basis; . . . .

36 U.S.C. § 393 provides for the authority of an NGB and states, in pertinent part:

For the sport which it governs, a national governing body is authorized to --

(1) represent the United States in the appropriate international sports federation;

(2) establish national goals and encourage the attainment of those goals;

(3) serve as the coordinating body for amateur athletic activities in the United States; . . .

(6) recommend to the Corporation [the USOC] individuals and teams to represent the United States in the Olympic Games and Pan-American Games; and

(7) designate individuals and teams to represent the United States in international amateur athletic competition (other than the Olympic Games and the Pan-American Games) and certify, in accordance with applicable international rules, the amateur eligibility of such individuals and teams.

Finally, 36 U.S.C. § 391 provides:

> (b) No amateur sports organization is eligible to be recognized or is eligible to continue to be recognized as a national governing body unless it -- . . .
>
> (6) provides an equal opportunity to amateur athletes; coaches, trainers, managers, administrators, and officials to participate in amateur athletic competition, without discrimination on the basis of race, color, religion, age, sex, or national origin, and with fair notice and opportunity for a hearing to any amateur athlete, coach, trainer, manager, administrator, or official before declaring such individual ineligible to participate; . . . .

The First Circuit's interpretation of Title IX and its requirements, *i.e.*, that the athletic programs of a college or university mirror, on a gender basis, the student body enrollment, adversely impacts and may effectively eliminate the NGB's ability to (1) utilize college and university programs as a mechanism to identify potential elite athletes and (2) utilize these programs as training grounds for athletes who have the ability to compete in protected competitions, including the Olympic Games. Through its interpretation, the First Circuit may very well have put Title IX in conflict with the provisions of 36 U.S.C. § 374(4), which requires the USOC to obtain, either directly or through delegation to the appropriate NGB, the most competent amateur representation possible in each competition and event in the Olympic Games and the Pan-American Games. Likewise, the First Circuit's interpretation of Title IX may require the NGBs, to the extent they are able to utilize college and university programs for identifying elite athletes and for training programs, to support or foster a discriminatory program which would provide preferences to one sex over the other. While the NGBs are to provide equal opportunities for men and women as well as racial and ethnic

minorities and disabled persons, they are not permitted, under the Amateur Sports Act, to favor one group to the detriment of another. The First Circuit's interpretation of Title IX forces the NGBs, to the extent they utilize college and university programs for the purposes described herein, to sanction or endorse a program which has or can have the effect of enhancing women's sports to the detriment of men's sports.

Similarly, the First Circuit's interpretation in this matter, as well as other interpretations by courts which have addressed the issue of Title IX compliance, adversely impacts and may effectively eliminate an NGB's ability to fulfill its duty as required under 36 U.S.C. § 392 (1) and (6) requiring the NGBs to develop interest and participation in sports throughout the United States and requiring that the NGBs achieve their duties and responsibilities without discrimination.

Through utilization of college and university programs, NGBs can fulfill this obligation and duty as required under the Amateur Sports Act. However, Title IX, as it has been interpreted and implemented in light of decisions such as that in the First Circuit in this case and in *Roberts v. Colorado State University*, 998 F.2d 824 (10th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 580, 126 L.Ed. 2d 478 (1993), infringes upon the NGB's ability to fulfill its obligations and duties. In *Roberts v. Colorado State University, supra,* at 830, the court stated:

> We recognize that in times of economic hardship, few schools will be able to satisfy Title IX's effective accommodation requirement by continuing to expand their women's athletics programs. Nonetheless, the ordinary meaning of the word "expansion" may not be twisted to find compliance under this prong when schools have increased the relative percentages of women participating in athletics by making cuts in both men's and women's sports programs. Financially

> strapped institutions may still comply with Title IX by cutting athletic programs such that men's and women's athletic participation rates become substantially proportionate to their representation in the undergraduate population.

Relying in part on the First Circuit's decision in *Cohen v. Brown*, 991 F.2d 888 (1st Cir. 1993), the Tenth Circuit has adopted the rationale that, particularly in times of economic hardship, colleges and universities can only comply with Title IX if they utilize the safe harbor. Such an interpretation mandates that (1) men's programs be eliminated to reach proportionality between the participation of men and women in athletics and the ratio of men to women in the student body; or (2) women's programs be added to reach a proportionality between participation of men and women in the athletics programs and men and women in the student body. Regardless of the alternative selected, the First Circuit's decision as well as the Tenth Circuit's interpretation would mandate that schools utilize the "safe harbor" to obtain Title IX compliance. This would effectively eliminate schools' usage of the other two prongs of the regulations interpreting Title IX compliance, *i.e.*, historical expansion of women's athletic programs or fully and effectively accommodating the interests of the under-represented gender.

Elimination of those provisions which allow Title IX compliance to be demonstrated through historical expansion of women's programs or through fully and effectively accommodating women's interests should not be accepted. This Court should accept Brown University's Petition for Certiorari to review the First Circuit's interpretation, which has been adopted and accepted by the vast majority of the court's considering this issue.

The First Circuit's interpretation, which effectively eliminates the ability to rely on historical expansion of women's athletic programs, penalizes colleges and universities for quickly responding to the mandates of Title IX to bring gender equity into their athletic

programs. Under the First Circuit's analysis, finding that Brown did not meet the historical expansion test, Brown would have been better off denying opportunities for women in the 1970's, when the women's programs were significantly increased and instead increasing women's programs on a single-sport basis every three to four years to show historical expansion of its programs. Likewise, the First Circuit's interpretation eliminates a college's or university's flexibility in dealing with the economic realities of its athletic programs.

The concept of historical expansion cannot be isolated so as to preclude the possibility of elimination of various women's sports at some future point if (1) interest in the sport declines to such an extent that the sport can no longer be justified at the college or university or (2) economic realities require that certain sports be eliminated. Historic expansion of a college's or university's athletics programs must be looked at from the time of implementation of Title IX on an overall basis as to what has occurred in the athletic programs of a particular college or university. The court must look at expansion as well as reduction of sports programs to determine whether historically the under-represented gender's sports program has been enhanced. If women's programs have been added over a period of time and then all men's and women's sports programs have been cut, but men's sports programs have been cut more drastically than women's sports programs, such an overall view of the historical context of women's sports within an athletics department at a college or university must be considered and should be given credence and credit with regard to meeting the historical expansion provisions which would demonstrate Title IX compliance. Any other interpretation would require colleges and universities to rely only on the safe harbor to demonstrate Title IX compliance in its athletic programs.

Such is a particularly difficult and illogical conclusion in times of economic hardship or difficulty. However, allowing the entire historical consideration of the program to be reviewed, would be consistent and congruent with the provisions of the Amateur

Sports Act requiring NGBs to utilize their efforts to develop interest and participation throughout the United States and be responsible to the persons in amateur sports organizations that they represent. Likewise, review of the entire history of the sports program would preclude the result of the First Circuit's opinion which ultimately mandates that Title IX be a quota statute rather than an anti-discrimination statute.

The First Circuit's interpretation of Title IX, and its rejection of Brown University's argument with regard to the full and effective accommodation of the interests of the men and women participating in sports programs, also eliminates the ability to rely on this provision of the Title IX regulations to determine Title IX compliance. The First Circuit's interpretation suggests that if a single woman believes that she would like to participate in a sports program, regardless of whether there is sufficient interest to field a team, that woman's interest must be met in order to demonstrate Title IX compliance that a college or university has "fully and effectively accommodated" the interests of the under-represented sex.

Such is inconsistent with the provisions of the Amateur Sports Act requiring the NGBs to obtain for the United States the most competent amateur representation possible. Effectively, the First Circuit's interpretation of this prong of the Title IX analysis could require a college or university to have 75% women participation in athletic programs if 75% of the women enrolled desired to participate in a sports program in order to fully and effectively accommodate the interest of women at a college or university. Thus, men's programs could or would be thrown substantially out of proportion with the enrollment of men at a college or university to meet the third prong of Title IX as currently interpreted by the First Circuit. This interpretation requires all colleges and universities to rely only on the safe harbor, rather than proportionality in fully and effectively accommodating the interests of the students to the same level, *i.e.*, meeting the needs and desires of the male athletes to the same percentage as meeting the needs and desires of the female athletes.

Again, the First Circuit's opinion effectively requires that, in order to be in compliance with Title IX if a college or university is going to have an athletics programs, the college or university must have proportional participation by men and women as compared to the ratios in the student body. Such a conclusion should not and cannot be the effect of Title IX. If a college or university has a population of men and women that is roughly equivalent but 75% of the men wish to participate in athletics while only 25% of the women wish to participate in athletics, that college or university should not be forced to develop a program which has a 50% male 50% female participation in athletics when such is not reflective of the interests of the student body as a whole. The First Circuit's decision in this matter would, however, under the described scenario, require that a college or university have a 50/50 representation of men and women in its athletics programs in order to be in compliance with Title IX.

The First Circuit's interpretation of Title IX, requiring colleges and universities to meet the safe harbor, interferes with and effectively eliminates the abilities of NGBs, including USA Wrestling, U.S. Swimming and U.S. Water Polo, from fulfilling their duties and obligations under the Amateur Sports Act. These NGBs may not be able to rely upon and utilize college and university programs to identify potential elite athletes. Absent unlimited resources, the First Circuit's decision likely mandates the elimination of various sports programs in order to come into compliance with Title IX. Thus, the First Circuit's interpretation of Title IX creates a conflict with the NGB's duties and responsibilities as identified in the Amateur Sports Act.

Title IX should be utilized to establish gender equity within college and university athletic programs. It should not be utilized to create quotas nor should it mandate the manner by which a college or university operates its athletics programs. Athletics programs involve competition. Athletics programs do not involve simple statistical comparisons. Different people have different interests and desire different levels of participation in athletic competition. To impose a

statistical comparison would have an adverse impact on all athletics programs at all colleges and universities, as those persons who have a true desire to participate in athletic competition (in the case of the NGBs, those athletes who may be the most competent amateur athletes in the sport and be potential candidates for selection to participate in the Olympic Games or other protected competitions) could be subordinated to those who have merely a passing fancy with regard to such participation.

If a college or university can show that its historical practice since the implementation of Title IX has been to benefit the under-represented gender's athletic program, that college or university should be found in compliance with Title IX. Likewise, if a college or university can demonstrate that it is fully and effectively accommodating the interests of the under-represented gender in comparison to its accommodation of the predominantly represented gender, then again the college or university should be deemed in compliance with Title IX. However, the First Circuit's decision has eliminated the ability of a college or university to demonstrate such compliance and has created a statutory scheme which provides only for safe harbor protection with regard to athletics programs *i.e.*, the athletics programs must mirror or effectively mirror proportionality between men and women in the student body.

CONCLUSION

For the reasons stated in Brown University's petition for writ of certiorari as well as the reasons stated above, this Court should review the First Circuit's decision, as it is contrary to the purpose and intent of federal laws that have been passed in this country to remedy discrimination mandating quotas for athletics programs and it appears to create a conflict between two federal statutes.

Respectfully submitted,

CHRISTOPHER CIPOLETTI
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VIA FACSIMILE 401/421-0132

March 18, 1997

Lynette Labinger
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Re: *Brown University v. Cohen*
Supreme Court No. 96-1321

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Dear Ms. Labinger:

Please confirm through your signature below that you consent on behalf of your clients to the filing of an amicus brief on behalf of USA Wrestling, United States Water Polo and related national governing bodies in support of Brown University's petition for certiorari. Please return a copy of this letter by fax with your original signature returned by United States Mail. Thank you for your prompt response.

Very truly yours,

CHRISTOPHER CIPOLETTI

CC:tls

Lynette Labinger
Date 3/18/97

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March 19, 1997

BY FEDERAL EXPRESS

Christopher Cipoletti, Esq.
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Re: Brown University v. Cohen, No. 96-1321

Dear Mr. Cipoletti:

This letter will confirm that petitioners in the above-referenced action consent to the filing of an amicus brief on behalf of the United States Wrestling Association.

Very truly yours,

Maureen E. Mahoney
of LATHAM & WATKINS

No. 96-1321

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

BROWN UNIVERSITY, *et al.*,
Petitioners,

v.

AMY COHEN, *et al.*,
Respondents.

CERTIFICATE OF SERVICE

I, Christopher Cipoletti, a member of the Bar of this Court, hereby certify that on this 21st day of March, 1997, the original and 40 copies of the AMICI CURIAE IN SUPPORT OF BROWN UNIVERSITY'S PETITION FOR A WRIT OF CERTIORARI in the above-referenced case were mailed by postage prepaid, first-class mail to:

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I further certify that all parties required to be served have been served.

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Supreme Court, U.S.
FILED
(10)
961321 MAR 21 1997
OFFICE OF THE CLERK

No. 96-

In The
Supreme Court of the United States
October Term, 1996

BROWN UNIVERSITY, *et al.*,

Petitioners,

v.

AMY COHEN, *et al.*,

Respondents.

Petition for a Writ of Certiorari
To The United States Court of Appeals
For The First Circuit

BRIEF OF AMICI CURIAE AMERICAN BASEBALL COACHES ASSOCIATION, COLLEGE GYMNASTICS ASSOCIATION, COLLEGE SWIMMING COACHING ASSOCIATION OF AMERICA, NATIONAL WRESTLING COACHES ASSOCIATION, UNITED STATES LACROSSE COACHES ASSOCIATION AND UNITED STATES WATER POLO IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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25 pp

QUESTION PRESENTED

1. Whether the Department of Education has exceeded its statutory and regulatory authority in propounding a Policy Interpretation of Section 1681 of Title IX of the Civil Rights Act that requires that male and female athletes be represented in intercollegiate athletic programs in "numbers substantially proportionate to their respective enrollments?"

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No. 96 -

In The
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October Term, 1996

BROWN UNIVERSITY, *et al.*,

Petitioners,

v.

AMY COHEN, *et al.*,

Respondents.

Petition for a Writ of Certiorari
To The United States Court of Appeals
For The First Circuit

BRIEF OF AMICI CURIAE AMERICAN BASEBALL COACHES ASSOCIATION, COLLEGE GYMNASTICS ASSOCIATION, COLLEGE SWIMMING COACHING ASSOCIATION OF AMERICA, NATIONAL WRESTLING COACHES ASSOCIATION, UNITED STATES LACROSSE COACHES ASSOCIATION AND UNITED STATES WATER POLO IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

INTEREST OF AMICI

This brief is submitted on behalf of six organizations (collectively "Amici" or "Amici Curiae"). Unless reversed, the U.S. Court of Appeals for the First Circuit's decision in this case will adversely impact the interests that each organization seeks to promote.

The American Baseball Coaches Association ("ABCA") is a tax-exempt unincorporated association with 5800 members. It represents active coaches, former coaches and other individuals who are actively engaged in promoting baseball. Among its objectives are to promote excellence in the coaching of baseball, to promote the game of baseball, and to promote and develop leadership in baseball, especially within educational institutions.

The College Gymnastics Association ("CGA") is a non-profit association composed of 30 active and 74 association members. It represents active and retired coaches, as well as, officials and administrators. Its mission is to train and coach student-athletes in American colleges to compete in men's gymnastics competitions, including NCAA championships.

The College Swimming Coaches Association of America ("CSCAA") represents men's and women's collegiate swimming coaches at the junior college, NCAA Division I, II and III, and NAI level. CSCAA has 890 members.

The National Wrestling Coaches Association ("NWCA") is a national organization of amateur wrestling coaches and officials. Its 1700 members coach wrestlers in junior high school, high school and college. The NWCA's purpose, in part, is to sponsor competitions, recognize achievement and foster the sportsmanship and integrity that are the cornerstone of athletic competition.

United States Lacrosse Coaches Association ("USLCA") represents all male lacrosse coaches throughout the United States. Its 1113 members coach lacrosse at all levels of

competition. The USLCA's purpose, in part, is to conduct clinics, recognize achievement and promote lacrosse.

United States Water Polo ("USWP") is the national governing organization for water polo in the United States. It is recognized by the United States Olympic Committee. USWP's mission is to promote the sport of water polo in the United States and it represents approximately 20,000 members including collegiate coaches.

Unless reversed, many members of ABCA, CGA, CSCAA, NWCA, USLCA and USWP will be adversely affected by the decision of the U.S. Court of Appeals for the First Circuit here. Thus, amici are concerned with the key issue in this case: the scope of compliance with Title IX.

Pursuant to Supreme Court Rule 37.3, counsel for Amici, who are employed by the New England Legal Foundation, have obtained written consent for the filing of this brief from counsel for Petitioner and Respondent. The consents are submitted with this brief.

STATEMENT OF THE CASE

Amici accept and adopt the Petitioner Brown University's Statement of the Case.

BACKGROUND STATEMENT OF CONCERN

The social and emotional importance of the issues raised in Brown University's petition for certiorari are virtually self-evident. As the court below noted, "HEW apparently received an unprecedented 9,700 comments on the Proposed Title IX athletics regulations, prompting Secretary Caspar Weinberger to remark, "'I had not realized until the comment period that athletics is the single most important thing in the United States.'" *Cohen v. Brown University*, 101 F.3d 155, 165 n.6 (1st Cir. 1996). That statement may be something of an

exaggeration, but not by much. The problems that have arisen from the implementation of Title IX touch on issues that relate to the fundamental distribution of legislative power within the modern administrative state. By its aggressive and novel reading of the Act, 20 U.S.C. § 1681, and of the regulations under it, the Department of Education ("DED"), which took over enforcement of Title IX from HEW, has taken onto itself the constitutional functions of both Houses of Congress, and has enacted, under the guise of "interpretation," a new law that contradicts the language and purpose of the original 1972 Act. This Court should intervene in order to undo that arrogation of power and to return the power of legislation to Congress, where it belongs.

The facts and circumstances of this case have been set out with sufficient fullness in Brown University's petition for certiorari so that there is no reason to repeat them here. But it is important to recognize that the issues that have taken their toll on Brown University exert their influence on every university and college that fields intercollegiate teams. The implementation of Title IX was intended to insure equal chances for women and men to participate in intercollegiate athletics, but, as interpreted, its primary effect has been to reduce the effective participation of men. Since the passage of Title IX the number of men who participate in varsity sports at the high school level has remained roughly constant. But the number of programs available to men at the intercollegiate varsity level has declined. A few before-and-after statistics give a picture of the general story.

The National Federation of State High School Associations reports that in 1982 track and field programs were run by 14,405 high schools. *See* National Collegiate Athletic Association, PARTICIPATION STATISTICS REPORT 1982-95 at 131. In that same year, 577 out of 788 NCAA institutions sported intercollegiate track and field teams, a 73.2 percent participation level. *Id.* at 74. In 1995, 14,192 high schools

provided track and field programs but the percentage of NCAA institutions dipped to 65.1 percent, as only 588 out of 903 NCAA institutions had track and field programs. *Id.* at 74, 131. In 1982, 8,512 high schools had wrestling programs. *Id.* at 132. In that same year 363 of 788, or 46.1 percent of NCAA schools had intercollegiate wrestling programs. *Id.* at 80. In 1995, 8,538 high schools ran wrestling programs nationally, but the number of NCAA programs dipped to 257 out of 903 NCAA institutions, or 28.5 percent. *Id.* at 80, 132. In swimming, the relevant figures for 1982 had 3,757 high school varsity programs, with 377 swim programs for 788 NCAA institutions, a 47.8 percentage. *Id.* at 68, 130. The numbers for 1995 show 4,595 high school programs, but only 368 swim programs out of 903 NCAA institutions, for a figure of 40.8 percent. *Id.*

In all three of these sports, a constant level of high school sponsorship nationally from 1982-95 is followed by a significant percentage drop in the number of NCAA institutions sponsoring these sports. When collegiate institutions at all levels are taken into account the drop becomes still more dramatic. The NCAA, the National Junior College Athletic Association and the National Athletic Intercollegiate Association listed a total of 777 wrestling programs in 1972, but by 1996 that total dwindled to 325. The pursuit of group parity has lead to many needless individual sacrifices.

These declines in male participation cannot be attributed to any lack of interest on the part of male students. Nor in most cases can they be attributed to a growth in opportunities for women athletes. The present Policy Statement only looks at the number of male and female students participating in intercollegiate athletics. It takes no account of the number of positions that are presently open and authorized for male and female athletes, for the additional cost to bring a student on the varsity team, or of the ability of the sport to generate the revenue -- be it from ticket sales, donations or other sources -- needed to cover its expenses. These simple omissions lead to

some striking anomalies. According to NCAA participation statistics, the average size of a 1995 men's baseball squad is 29.7 players. But the average size of a women's softball team is only 17.1 players. The Policy Statement's crude, paint-by-numbers approach treats this situation as though it generates a shortfall of 12 women players that must somehow be made up. It does not matter for these purposes how many additional unfilled spots are available on the women's softball team; nor does it matter that large numbers of male student athletes must be turned away, even if they do not receive any scholarship support, or even make the traveling squad. Nor does it make a difference that huge scholarships are used to coax female students to participate in athletics, while male athletes beg to participate as walk-ons. All that matters under the Policy Interpretation is the wrong bottom line, not the social preferences or processes that lead to them. The only way that the baseball team can accept more members is to beg the softball team to do the same. Two programs that should be independent and self-sufficient are yoked by the law into one. So long as not "enough" women do not wish to play, some men will be barred from playing.

To give another illustration of how skewed matters have become under the present Policy Interpretation, consider the State University of New York in Albany, a Division III school, which offers no athletic scholarships, where all athletes simply participate out of their love for the sport. A few years ago, 14 women tried out for the softball team, two of whom subsequently quit the squad. Over 70 men tried out for the baseball team, but only 32 made the team. Under the current accounting, the numerical imbalance meant that 20 hypothetical women were treated as though they were denied opportunities that were theirs for the asking. Yet by the same token the nearly 40 men who could not participate on the male team were treated as invisible creatures whose interests vanish under the interpretative rules of the Department of Education.

These skewed figures should not come as a surprise to anyone who looks at the relationship between college and high school athletics. The basic pool of varsity athletes at the college level is drawn from the pool of high school athletes. Even with the large increase of female high school athletes since the passage of Title IX, at the high school level today male athletes outnumber female athletes by 64 to 36 percent. But no effort is made under the law to normalize the required levels of participation at the college ranks to take into account the major differences in the pool of men and women athletes. Of course, Amici do not argue that this ratio is immutable, for it has clearly changed over the years. But by the same token, no one should assume that women are so passive, and universities are so unresponsive that any increase in participation will only come from federal enforcement efforts. The women students who attend our colleges and universities are part of this nation's educational elite. They will become physicians, professors, administrators and, yes, even lawyers. They will excel in business and the arts. They will marry and raise families. They will participate in the political life of our nation. They are as fully capable as their male counterparts of making their own choices of extra curricular activities, in voicing their desires to university administrators, and in taking the initiative in organizing their participation in varsity athletics. It should not be assumed that those women who choose not to participate in intercollegiate sports are in the grip of some false consciousness, or squander away their time in frustration or idleness. The obvious assumption is that they will participate in higher levels than men in other campus activities from journalism to political organization.

Unfortunately, harmful effects follow from the assumption that differential levels of participation must be, always and solely, the product of illicit discrimination. Authorized but unused places are now totally ignored in making any overall determination of athletic opportunities. Since both

input and interest levels are skewed by circumstances outside the control of universities and colleges, draconian measures have to be taken to bring all programs back into compliance with external norms that make little programmatic sense. New women's teams may be added in sports like golf and cross-country, but analogous programs will not be instituted for men, lest the original imbalance be preserved. It matters not that a male team for 20 could be added for $10,000, while a female team for 10 costs twice as much. Or, when the budgetary pressures become severe, universities will limit male participation, no matter how little it saves because they cannot afford to incur the heavy costs to bring a new competitive women's varsity team on line. Title IX, which heralds increased participation of university women in college level varsity sports ends up as a victim to the law of unintended consequences. Female participation does not increase, but male participation declines. The number of excluded female athletes is small, or zero; the number of excluded male athletes soars. Congress did not intend for Title IX to level participation in intercollegiate activities downward.

Yet none of this has to be. Universities are able to manage their athletic programs within the original equal opportunity constraints of Title IX. But they should not be forced to negotiate the obstacles to sensible athletic programs that have been erected, as will now be shown, by the unauthorized expansion of Title IX through the Department of Education's 1979 final Policy Interpretation.

ARGUMENT

I. TITLE IX IS DRAFTED TO ADVANCE THE PRINCIPLE OF EQUAL OPPORTUNITY BETWEEN MEN AND WOMEN, WITHOUT PREFERENTIAL TREATMENT FOR EITHER.

In 1972, Congress passed Title IX of the Civil Rights Act which provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C.A. § 1681(a) (West 1997). The focus of this Section was on the individual person, and, as applied to universities, was designed to make sure that each individual as an individual had an equal opportunity to participate in all programs or activities, including physical education. The purpose of this Section was corrective, that is, to eliminate the forms of discrimination that might have been in place in higher education prior to the date of passage. As stated by Senator Bayh, the purpose of Title IX was to "[p]rovide for the women of America something that is rightfully theirs -- an *equal chance* to attend the schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they will have a fair chance to secure the jobs of their choice with equal pay for equal work." 118 Cong. Rec. 5808 (1972) (emphasis added). Most emphatically, the purpose of Title IX was not to create or foster new forms of discrimination by administrative action.

Any doubts on the scope of the general language of Section 1681(a) are removed when it is read in conjunction with Section 1681(b), which states that "nothing" in Section 1681(a) "shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist" between the

total number or percentage of persons of that sex participating in any federally supported program or activity, and "the total number or percentage of persons of that sex in any community, State, section, or other area." 20 U.S.C.A. § 1681(b) (West 1997). The only offset to this provision is also found in Subsection (b) insofar as it states that it "shall not be construed to prevent the consideration in any . . . proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex." *Id.*

The clear import of these sections taken together is that Congress did not wish for the ending of one form of discrimination to lead to the rise of a second form of discrimination that could be, both in its intention and effect, more invidious and pervasive than the purported discrimination that it displaces. Yet by the same token, it realized that proof of discrimination in some cases could be difficult to achieve, and thus it allowed the use of statistical evidence to show a numerical imbalance.

But it is equally clear what this Section did not do. It did not treat any numerical imbalance based on crude participation rates as proof of discrimination under Section 1681(a); normal statistical techniques require all sorts of adjustments be made to raw data in order to make sound comparisons, *see infra* at 15-17. Nor did Section 1681(a) say that any differential levels of participation in intercollegiate sports constitutes a presumptive violation of the law that is excused by showing preferential treatment in favor of women athletes as the "underrepresented sex" -- a term that is nowhere found in Title IX itself. Rather the basic command of Section 1681(a) still stands as written. That command is still complemented by the prohibition against preferential treatment. Indeed under Section 1681(b) statistical evidence should be used as much to show the preferential or disparate treatment

forbidden under Title IX. It could, for example, be used to show discrimination against male athletes by the refusal of DED to measure participation levels as against potential participants instead of the entire student body. And at no point does Title IX show anything other than even-handed treatment for men and women, or require that the next generation of male athletes be placed at a legal disadvantage, even if an earlier generation of male athletes benefitted from practices now prohibited by law. In short, Section 1681 did not authorize disparate treatment of men *or* women athletes. It prohibited any favoritism, in either direction.

II. THE DEPARTMENT OF EDUCATION EXCEEDED ITS STATUTORY AUTHORIZATION IN PROMULGATING ITS 1979 POLICY INTERPRETATION.

Title IX represents a delicate Congressional compromise between the commands of the antidiscrimination law and the autonomy and academic freedom of the universities that fall under its scope. That compromise is not perfect or ideal, and is frayed around the edges. Congress, if it so chose, could modify the provisions of Title IX in order to adjust the burdens of proof and the types of evidence used to prove discrimination. But OCR is kept on a short leash under Section 1681(b). It is charged with the implementation of the statute, not with its amendment. Its powers are hemmed in by the explicit requirement that the statute shall "not be interpreted" to require either preferences or disparate treatment. An acceptable system of regulations has to respect all portions of the basic statute, and cannot pick and choose among its commands, more or less at will. But in this case, the HEW strayed from its mandate with its 1974 regulations, and DED flatly contravened it with its 1979 final Policy Interpretation.

The OCR's regulations address the level of support available for students engaged in "interscholastic,

intercollegiate, club or intramural athletics."[1] But these regulations do not hone in on the central question posed by a statutory requirement of equal opportunity: whether members of one sex have been denied opportunities that have been given to members of the other sex. The best way to examine that question is to ask whether any individuals have been excluded from activities in which they want to participate. To the extent that the percentages of excluded males and females are equal, then equal opportunity for members of both sexes has been afforded. Colleges, of course, have budgetary and space limitations and therefore full opportunities cannot be supplied to members of either sex. Yet the closest that the regulations come to posing the central question is found in Section (c)(1) which simply asks: "Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes," without indicating by what

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1. Equal Opportunity. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

(1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
(2) The provision of equipment and supplies;
(3) Scheduling of games and practice time;
(4) Travel and per diem allowance;
(5) Opportunity to receive coaching and academic tutoring;
(6) Assignment and compensation for coaches and tutors;
(7) Provision of locker rooms, practice and competitive facilities;
(8) Provision of medical and training facilities and services;
(9) Provision of housing and dining facilities and services;
(10) Publicity

24 C.F.R. § 106.41 (c).

standards the university programs will be judged.

The 1979 final Policy Interpretation sought to fill the gap left in the 1974 regulations. Its relevant passages read as follows:

> (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
> (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
> (3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

44 Fed. Reg. at 71,418.

This final "policy interpretation" represents a sharp and unauthorized break from the language and scope of both Title IX and the 1974 regulations. Note the contrasts. The 1974 regulations apply to all "interscholastic, intercollegiate, club or intramural activities." 24 C.F.R. § 106.41(c). The Policy Interpretation applies only to intercollegiate athletics. The 1974 regulation demanded only that "the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes." *Id.* The Policy Interpretation requires an effective accommodation solely for members of the "underrepresented gender," an ill-disguised

reference to women in virtually all cases. Where the regulation speaks in terms of equal opportunities, the Policy Statement speaks in terms of equal results, regardless of the level of interests and capabilities that male and female students bring to athletics.

This Policy Interpretation is more accurately styled a Policy Revolution, so great is its deviation from Congress's stated intentions. If the standards articulated in this Policy Interpretation were applied to all programs and activities covered by Title IX, then every university in the land would be in massive noncompliance with the law, not only in athletics but everywhere else. In the context of academic programs, Title IX would be read to require a rough proportion of men and women in engineering and science on the one hand, and art and literature on the other, even though most certainly far more men are engaged in the former activities, and far more women students are engaged in the later. Yet it is easy to imagine the public outcry. Thus if an engineering program enrolled 80 men and 20 women, the only choices open to the school would be to exclude 60 men, to find 60 additional women to enroll in the program, or some combination of the above. The same result would apply in reverse in literature. The quest for equal opportunity would turn into a full-scale expedition to find less qualified and less interested men and women, to fill valuable seats that they do not want so that interested men and women could fulfill their own career ambitions -- albeit in an educational environment far less conducive to productive study. It is hard to believe that any conception of equal opportunity requires this unannounced social transformation. But the logic of the Policy Interpretation leaves no viable intellectual alternative. And it is all in the name of equal educational opportunity.

The Policy Interpretation is no less revolutionary in its consequences even if it is confined solely to student athletics. The 1974 regulations apply not only to intercollegiate sports;

they also apply to all interscholastic, club and intramural programs. Typically, these programs are open to men and women in proportion to the numbers who sign up to participate, which results in greater levels of disparity in many sports than are found on intercollegiate teams. If the Policy Interpretation were extended to these activities, then most, if not all, collegiate intramural programs in the United States are in violation of the statute. So startling a policy change should be implemented by Congress, if it is to be implemented at all. It should not be smuggled into the law by a Policy Interpretation that has never been subject to Congressional examination or approval. Nor should it be accorded any special presumption of legitimacy under the law. *See, e.g., Drake v. Honeywell, Inc.*, 797 F.2d 603, 607 (8th Cir. 1986).

Simply stated, the Congressional desire to create equal opportunity meant an elimination of biases that existed prior to the passage of the statute. At no point did Title IX embrace the punitive philosophy that two wrongs make a right. It did not command that men should have fewer opportunities to engage in sports after the passage of Title IX because they -- that is, other men -- had more opportunities before. Rather Title IX was designed to be sure that equal opportunity did not become a requirement for equal results or for the backdoor invocation of preferential treatment. Lamentably the "substantially proportionate" requirements found in paragraph (1) of the Policy Interpretation require just what the language of Title IX expressly forbids.

Indeed the interpretation that the DED has attached to its own regulations is far more extravagant than other government efforts to use "effects" tests. The decision in *Griggs v. Duke Power*, 401 U.S. 424 (1971) introduced disparate impact into Title VII of the Civil Rights Act governing employment relations. Yet this Court itself recognized the excesses of *Griggs* as a matter of statutory interpretation when it cut back on the decision in *Wards Cove*

Packing Co., Inc. v. Atonio, 490 U.S. 642 (1989). But even in the heyday of *Griggs*, the application of that disparate impact test did not rest on any crude measure of the number of black and white individuals within any community. Rather it depended on sophisticated efforts to determine by geography and training, which individuals fall within an "availability pool" and which do not, as *Wards Cove* itself recognized. And courts have allowed defendants charged with sex discrimination in employment under a disparate impact theory to show the differential levels of interest that men and women have in certain positions. *See, e.g., EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302 (7th Cir. 1988).

This same sophisticated approach could, and should be carried over to any statistical analysis conducted under Section 1681(b), with an eye to determining how many men and women are interested in participation in various varsity programs. The precise estimates are of course subject to honest dispute in many cases, but the one statistical technique that is certain to be wrong is that which makes no correction from the base number of enrolled students. Yet that is precisely the approach taken in the Policy Interpretation.

Note the evidence that has been omitted. It is well known that levels of participation in varsity athletics at the College level are influenced by the level of participation in College sports at the high school level. It is also known that male participation in high school is far greater than female participation. Similarly, the regulations under Section 1681 recognize that only men participate in certain contact sports, such as, wrestling or boxing. Yet the Policy Interpretation ignores what the regulations recognize: no adjustment is made in the overall proportionality requirements to take into account the low level of demand that women athletes have for certain contact sports, even though that is a key component of overall demand for sports. *See Cohen*, 101 F.3d at 192-93 (Torruella, C.J., dissenting). It is also well apparent that even when

positions are authorized for men and women athletes, fewer vacancies arise in the male programs than in the female programs. Yet the Policy Interpretation makes no effort to take into account the number of unused slots to determine whether male and female athletes have equal chances at participation. Rather, the Policy Interpretation assumes without explanation that opportunities that have not been used are opportunities that have not been offered. In so doing, the Policy Interpretation leaves colleges desperately trying to induce uninterested women to participate in sports, not so that they will benefit, but so that the number of willing and eager male athletes that can be accommodated into the program increases.

The Policy Interpretation marks a revolution in the governmental control of college programs. The whole emphasis of Title IX is to expand the number of opportunities that are available to individuals of both sexes. The dominant effect of the Policy Interpretation is to reduce the number of athletes who will participate in intercollegiate athletics. Taken at face value, any university or college can comply with the Policy Interpretation by shutting down all of its athletic programs. Under DED's substantially proportionate test, *no* opportunities for either sex satisfy to the letter the most stringent reading of the equal opportunity command, even if it defeats the original legislative intention.

It will, of course, be said in reply, that no school would dare shut down its programs for male athletes, so that in practice compliance with the statute will lead to a higher level of participation for female athletes even if it does not lead to a higher number of male athletes. But the numbers at Brown tell a different story. "During the 1990-91 academic year, Brown fielded 16 men's and 15 women's varsity teams on which 566 men and 328 women participated. By the 1993-94 year, there were 12 university-funded men's teams and 13 university funded women's teams. These teams included 479 men and 312 women." *Cohen*, 101 F.3d at 192 (Torruella, C.J., dissenting).

All this litigation has left fewer women and many fewer men participating in intercollegiate athletics. That result should offer no comfort to those who attribute only benign consequences to the Policy Interpretation. The addition of new teams costs money, money which is not available in the age of budget deficits. Yet parity between the sexes can be restored, at budgetary savings, only by cutting men's teams and not by cutting women's teams. That logic applies even if the identical amount of spending would have allowed either 50 men or 10 women to compete, but not both. Congress clearly preferred to expand total opportunities. The Policy Interpretation creates powerful incentives for universities to contract them. In addition, the lesson of this case is never add a women's team on an experimental basis because it will be impossible to cut it later without gut-wrenching litigation. In the world of the Policy Interpretation all experiments succeed so long as they increase the short-term participation of women athletes. The entire system of proportionate representation in intercollegiate athletic programs thus pits male athletes against female athletes, and does nothing to advance the sensible management of any athletic program.

Yet it will be said that the Policy Interpretation is not that rigid because it contains two savings clauses which allow those universities that do not meet the substantially proportionate test to show that they are well along the way. But neither of these saving clauses remedies the incurable defect of the basic numerical standard. Proportionate representation is utterly inconsistent with the demands for equal opportunity. If so, then it is wholly improper for the DED to defy the will of Congress by treating universities as though they were in compliance with Title IX only if they pursue an end that is inconsistent with the basic statutory command. Yet that is exactly what the second prong of the Policy Interpretation does.

More specifically, part (2) offers protection only for those programs that show continuing expansion for the

underrepresented sex. There is no correction here for levels of interest. And the Section unwittingly encourages universities like Brown to go slow with their expansion so that they can continue to improve their ratio, here by denying today's women the opportunity to participate in programs that would, in the absence of the Policy Interpretation, be promptly implemented. Nor does part (3) provide any relaxation from the presumptive quota provision because it looks only at the "interests and ability" of the underrepresented sex and attaches no weight to the claims of members of the other sex for participation in the program.

The Policy Interpretation represents a radical repudiation of Congress's original program. The obstacles it imposes on male athletes is in clear violation of the basic principle of equal opportunity that each person should count for one and only for one. From behind the fig-leaf of "underrepresented sex" the Policy Interpretation engages in the very form of preferential treatment that Title IX itself prohibits. This interpretation flouts the desires of Congress and it opens up the serious question of whether it authorizes a form of covert sex discrimination that is in violation of the equal protection clause. *See* U.S. CONST., amend. XIV; *Adarand Constr. Inc. v. Pena*, 515 U.S. ___, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995). But there is no need to face these difficult questions since the DED has so clearly overstepped the limits of its Congressional mandate. A statute that was designed to secure equal opportunity for all persons has now been construed to require preferential treatment for women over men. Congress never authorized that result. This Court should grant certiorari in this case to see that DED steers the statutory course, not its own.

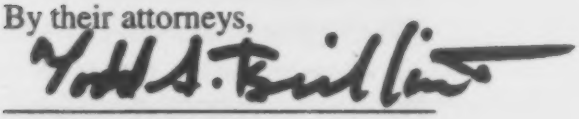
CONCLUSION

For the reasons stated above, this Court should grant the petition for a writ of certiorari and, after hearing the case, reverse the decision of the U.S Court of Appeals for the First Circuit that Brown University is in violation of Title IX.

Respectfully submitted,

American Baseball Coaches Association, College Gymnastics Association, College Swimming Coaches Association of America, National Wrestling Coaches Association, United States Lacrosse Coaches Association and United States Water Polo

By their attorneys,



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DATED: Boston, Massachusetts: March 19, 1997

Supreme Court, U.S.
FILED
MAR 21 1997
CLERK

No. 96-1321

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

BROWN UNIVERSITY, *et al.*,
Petitioners,

v.

AMY COHEN, *et al.*,
Respondents.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION, INDEPENDENT WOMEN'S FORUM, AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether a university that seeks to offer varsity sports teams that accommodate equally the athletic interests of qualified men and women can be liable for "discrimination" on the "basis of sex" within the meaning of 20 U.S.C. § 1681(a) of Title IX based solely on evidence that (1) the percentage of women participating in varsity athletics is lower than the percentage of women in the student body; and (2) there are some women in the student body who want to play on a viable varsity team that is not funded as part of the university's athletic program.

2. Whether this Court's jurisprudence requires, instead, that in determining whether women have been "subjected to discrimination," 20 U.S.C. § 1681(a), the relevant statistical comparison is between the gender composition of the varsity athletes and the gender composition of the qualified and interested potential athletes in the student body population.

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BRIEF OF THE WASHINGTON LEGAL FOUNDATION, INDEPENDENT WOMEN'S FORUM, AND ALLIED EDUCATIONAL FOUNDATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with thousands of supporters who live in all fifty states. Through litigation, participation in the administrative process, and publication, WLF seeks to promote and protect the free enterprise system and the economic and civil liberties of individuals and businesses.

WLF has a record of longstanding interest and involvement regarding the controversial issues of affirmative action, racial and gender quotas, and reverse discrimination. In pursuit of its view that the Constitution and the civil rights laws protect all citizens against discrimination, WLF has appeared before this Court as well as other federal and state courts in many of the leading cases in the area. *See, e.g., Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097 (1995); *Shaw v. Reno*, 113 S. Ct. 2816 (1993); *Metro Broadcasting, Inc. v. Federal Communications Comm'n*, 497 U.S. 547 (1990); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984).

The Independent Women's Forum (IWF) is a non-partisan, non-profit organization of women who believe in limited government and equal opportunity for all Americans. IWF participated as an *amicus curiae* in support of Brown University in this case before the United States Court of Appeals for the First Circuit.

The Allied Educational Foundation (Allied) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, ALLIED is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Amici believe that the decision below in this case is wrong as a matter of law and incorrect as a matter of public policy. The court of appeals' decision, if not reversed by this Court, will cause immediate and serious harm to the varsity athletic opportunities of both male and female athletes in virtually every university throughout the nation. Moreover,

in areas other than athletics, the lower court's analysis would undermine the opportunities of women by imposing numerical limits based on proportional representation without regard to the interest levels and abilities of male and female students.

Amici submit this brief with the consent of Petitioner and Respondent. Consent letters have been lodged with the Clerk of the Court.

STATEMENT OF THE CASE

In the interest of judicial economy, *amici* adopt the Statement of the Case contained in the brief of petitioners, Brown University, *et al.* (referred to herein collectively as "Brown").

In brief, the appellate court concluded that Brown had violated Title IX and discriminated against women by failing to fund a sufficient number of women's varsity athletic teams. Specifically, Brown failed to satisfy the three-part test contained in a 1979 Department of Health, Education, and Welfare ("HEW") Policy Interpretation because Brown could not demonstrate that the percentage of its women varsity athletes was "substantially proportionate" to the percentage of women in the student body. Nor, according to the lower court, could Brown demonstrate that it had "a history and continuing practice of program expansion," despite the fact that Brown had added 14 funded women's varsity teams to its athletic program between 1971 and 1977, added a women's winter track team in 1982, and currently funds many more women's sports teams than virtually every university in the United States. App. at 204a, 206a; 334a. Finally, the court ruled that Brown was not "fully and effectively"

accommodating the interests and abilities of women athletes because there were some women who had demonstrated the interest and ability to participate in a viable varsity athletic team. App. at 141-42a. *See* 44 Fed. Reg. at 71,418. Thus, the First Circuit concluded that, unless a university has achieved substantial proportionality, it must fund each and every viable women's team or violate Title IX.[1]

---

[1]The three-part standard articulated by the HEW provides, in full, that universities will be found in compliance if:

> (1) "intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to the respective enrollments"; or
>
> (2) "the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of [the underrepresented] sex"; or
>
> (3) "it can be demonstrated that the interests and abilities of the members of [the underrepresented] sex have been fully and effectively accommodated by the present program."

44 Fed. Reg. 71, 418. When this standard was first issued, the Office for Civil Rights for the Department of Education ("OCR"), the agency responsible for Title IX enforcement, interpreted this guidance to require universities to "meet the interests and abilities of women *to the same degree* as they meet the interests and abilities of men." OCR Title IX Intercollegiate Athletics Investigator's Manual ("OCR Manual") at 122 (1980) (emphasis added). App. at 291-93a. Subsequently, during the course of this litigation, OCR changed its view and embraced the First Circuit's interpretation of the three-part standard. *See* "Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test" dated Jan. 16, 1996 and cover letter from Norma V. Cantu. App. at 294-316a.

Both the district court and the First Circuit largely ignored the overwhelming and uncontradicted evidence introduced at trial by Brown that, among its prospective and current students, the number of men interested in participating in varsity athletics greatly outnumbers the number of women interested in varsity athletic participation. Specifically, Brown's expert demonstrated that only 38-39 percent of the prospective applicants who sent College Board questionnaires to Brown indicating that they planned to participate in varsity sports were women. App. at 320a, 331a, 336a. Similarly, women comprised only 42-45 percent of Brown's applicants for the classes of 1994 through 1998 who expressed an interest in participating in sports. App. at 319a, 329a. In addition, the relative participation rate of men to women in Brown's intramural program -- which has no limit on the number of students that can participate -- is eight to one, App. at 334a, and men outnumber women in Brown's club sports by a margin of three to one. App. at 335-36a.[2]

The First Circuit rejected Brown's view that Title IX "discrimination" must be analyzed by comparing the gender composition of varsity athletes to the gender composition of the interested and able potential athletes within the student population. The court found that the concept of a qualified pool "has no place in a Title IX analysis of equal opportunities for male and female athletes" because this approach would "undermine[] the remedial purposes of Title

---

[2]This evidence was gleaned through a review and tabulation of data from the 65,829 applications received by Brown for the classes of 1994 through 1998. *See* App. at 318. In addition, Brown's expert reviewed several large nationally representative data sources, including a review of seven different surveys conducted by independent institutions concerning young men's and women's interest and participation in sports at the national level. App. 320-27a.

IX by limiting required program expansion for the underrepresented sex to the status quo level of relative interest[]." *Cohen v. Brown*, 101 F.3d 155 (1st Cir. 1996) ("*Cohen IV*"), App. at 30a, 37a. The court reasoned that "even if it can be empirically demonstrated that, at a particular time, women have less interest in sports than do men, such evidence, standing alone, cannot justify providing fewer athletic opportunities for women than men" because women's lesser interest in sports is strictly the product of "women's historical lack of opportunities to participate in sports." *Id.*, App. at 42a, 40a.

REASONS FOR GRANTING THE WRIT

The First Circuit's decision effectively requires universities to reconfigure their varsity athletic program so that it either "mirrors the student enrollment as closely as possible," *Cohen v. Brown*, 991 F.2d 888 (1st Cir. 1993) ("*Cohen II*"), App. at 118-19a, or so that it funds positions for each and every female athlete in the student body interested in competing on a viable team. In determining compliance with Title IX, universities may not take into consideration the existing interest levels and athletic abilities of their current population of female students, nor may they consider the number or percentage of interested and able male student athletes who are not being accommodated by the athletic program. Instead, under the reasoning of the decision below, universities are *required* to allocate coveted athletic opportunities to female students on a preferential basis.

This Court should grant review and overturn the lower court's decision for several important reasons. The First Circuit's decision directly conflicts with this Court's well-established line of precedent requiring courts to measure

discrimination in decision-making by reference to the "qualified pool" of individuals eligible to benefit from the decision. *See, e.g., Wards Cove v. Antonio*, 490 U.S. 642 (1989); *Hazelwood School Dist. v. United States*, 433 U.S. 308 (1977). The decision below, which specifically rejected the qualified pool concept and, instead, relies on statistical disparities between the percentage of female athletes and the percentage of women in the student body *as a whole*, is irreconcilable with these decisions.

Moreover, the decision below is having an immediate detrimental effect on the athletic programs of virtually every American university, and, as such, presents issues of exceptional importance that warrant resolution now. Universities across the country are restructuring their athletic programs to strip male student athletes of athletic opportunities -- by shifting funding away from male teams, by strictly limiting the size of male athletic teams, and by wholly eliminating many male teams -- in an attempt to increase the relative percentage of participating female athletes. Not only do these machinations unfairly give preferential treatment to female athletes, many of these efforts have *little or no* effect on the raw number of opportunities provided for women athletes. Instead, they serve primarily to deprive male student athletes of their once-in-a-lifetime opportunity to participate in college athletics.

Finally, the issues raised by the lower court are of exceptional importance because of their application outside of the arena of varsity athletics. Title IX applies to *all* university programs, not just athletics. The logic of the decision below threatens to force strict gender proportionality in all aspects of university life, including *inter alia* class, major, and degree

enrollments, dormitory room allocations, and extracurricular activities.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS WHICH REQUIRE COURTS TO MEASURE DISCRIMINATION BY REFERENCE TO THE "QUALIFIED POOL"

In a long line of decisions discussing statistical proof of discrimination, this Court has given the lower courts clear direction as to the appropriate statistical inquiry. In determining whether discrimination can be inferred from statistical disparities, the proper comparison is between the number of individuals selected for whatever program is at issue and the number of persons *qualified* to participate in the program. *See Wards Cove*, 490 U.S. at 650-51 (rejecting as irrelevant comparison between percentage of nonwhite cannery workers and nonwhite noncannery workers; proper comparison for the initial inquiry in a disparate impact case is "between the racial composition of the qualified persons in the labor market and the persons holding the at-issue jobs"); *Hazelwood*, 433 U.S. at 308 ("The Court of Appeals was correct in the view that a proper comparison was between the racial composition of Hazelwood's teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market."); *see also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989) (emphasizing that an "inference of discriminatory exclusion" can only be made where there is "a significant statistical disparity" between the "number of qualified minority contractors *willing and able* to perform a particular service and the number of such contractors actually engaged [in the service]") (emphasis added); *Jackson v. Harvard University*, 721 F. Supp. 1397, 1430 (D. Mass. 1989), *aff'd*, 900 F.2d 464

(1st Cir.), *cert. denied*, 111 S. Ct. 137 (1990) (rejecting disparate claim based solely on the percentage of black female tenured faculty at Harvard Business School without comparison to the "qualified labor market for Harvard Business School professors").

These decisions demonstrate that plaintiffs relying on statistics to establish discrimination must provide statistical evidence based on the number of qualified and available potential *applicants*, and not based upon the population at large. The decision below here, however, ignored this Court's clear direction. Rather than conducting any analysis whatsoever of the qualified pool of potential female student athletes at Brown, both the district court and the First Circuit simply brushed aside as irrelevant this entire inquiry.

Indeed, the First Circuit went so far as to hold that even empirical proof of differing interest levels between male and female students would not justify disparate participation levels in athletics. *Cohen IV*; App. at 42a. Thus, according to the First Circuit, in order to remain within the safe harbor of substantial proportionality, Title IX *requires* that Brown force or cajole lesser-interested female students to participate in varsity athletics. Failing that, Brown must immediately fund and accommodate any and every female athlete that wishes to participate in varsity athletics on a viable team. Leaving aside the practical difficulties of implementing either program, it is certainly not what Title IX demands. Indeed, 20 U.S.C. § 1681(b) specifically prohibits the "grant [of] preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total

number or percentage of persons of that sex in any community, State, section, or other area."

Contrary to the statements of the First Circuit, both the text of Title IX and this Court's decisions in *Wards Cove* and *Hazelwood* explicitly recognize that disparities of interest, talent, curiosity, and capability can and will exist between various populations of racial groups and the genders. These differences do not violate anti-discrimination laws or the Equal Protection Clause. The First Circuit's decision, which inexplicably rejected this well-settled law, is improper and should be overturned by this Court.

II. THE PETITION PRESENTS ISSUES OF EXCEPTIONAL IMPORTANCE THAT WARRANT RESOLUTION BY THIS COURT AT THIS TIME

A. The First Circuit's Interpretation Of Title IX Is Having An Immediate And Detrimental Effect On The Athletic Programs Of Virtually Every University In The Country

In *Wards Cove*, this Court explained that failure to focus on the correct statistical inquiry -- between selected individuals and qualified, available individuals -- leads to a flawed analysis and can lead to a clearly wrong "solution" to the "discrimination" found. The First Circuit's interpretation of Title IX has lead to precisely such a wrong solution.

Wards Cove involved two populations of workers: noncannery workers, who were mainly white, and cannery workers, who were primarily nonwhite. 490 U.S. at 647. The lower court improperly concluded that discrimination was

shown by focusing on the racial disparities between the two groups of workers. *Id.* at 648-49. In rejecting this analysis, this Court noted that this statistical comparison was meaningless because it could be made to vanish simply by legitimate manipulation of the defendant's hiring practices. As this Court reasoned, "Under the Court of Appeals' approach, therefore, it is possible that *with no change whatsoever* in their hiring practices for noncannery workers. . . petitioners could make respondents' prima facie case of disparate impact `disappear,'" simply by hiring fewer nonwhite workers at the cannery. *Id.* at 654 (emphasis in original). This "solution" to the "discrimination" found by the lower court would obviously be of no benefit to petitioners, the nonwhite workers.

A similar analysis demonstrates the erroneous nature of the First Circuit's decision here. By ignoring the guidance of this Court that the equality embodied in Title IX requires universities to meet the interests and abilities of its male and female students *to the same degree*, the First Circuit has required universities, instead, to implement strict proportionality between the gender mix of its athletes and its student body. Such an alteration in the percentages of male and female athletes participating in the overall athletic program can be achieved most easily, however, simply by cutting and limiting the varsity opportunities for male student athletes. This "solution" is, obviously, of little or no benefit to women athletes or students, and inflicts severe and irreparable harm on existing male student athletes.

There is ample evidence to indicate that drastic cutting of varsity athletic opportunities for male athletes is precisely what is happening across the country in the wake of the First Circuit and other court's erroneous interpretation of Title IX.

At the outset, it is important to understand the widespread effect of a requirement for strict proportionality on virtually every university in the nation. At most, *no more than a very small few* of the hundreds of universities in this country have been able to implement strict proportionality in their athletic program. *See, e.g.,* Jim Naughton, *More Colleges Cut Men's Teams To Shift Money To Women's Teams,* The Chronicle of Higher Education, February 21, 1997 at A39 ("research indicates that only about 10 per cent of the country's colleges are in compliance with the law, and that true proportionality might be non-existent"); Mary Jordan, *Only One School Meets Gender Equity Goal*, The Washington Post, June 21, 1992 at D1. Thus, the First Circuit's interpretation of Title IX will have an impact on nearly every existing athletic program in the country.

The adverse effect on male athletic programs has already begun in earnest. Indeed, nearly every week, there are additional reports in the press of universities eliminating men's varsity teams in an attempt to comply with the strict proportionality ostensibly required by Title IX. *See, e.g.,* Jessica Gavora, *Quota System Hurts Team*, USA Today, July 23, 1996, at 14A (UCLA eliminated men's swimming and diving team that had produced 22 Olympic medalists, including 13 gold medals); Andy Boogaard, The Fresno Bee, Feb. 11, 1996, at D7 (Wyoming discontinues men's baseball after 30 years); Jerry Soifer, The Press Enterprise, Oct. 31, 1995, at D2 (over past several years, University of California (UC) Riverside, UC Santa Barbara, UC Irvine, Cal State Fullerton, and Cal State Long Beach have all eliminated men's football team); The Times Union, Aug. 30, 1995, at B1 (men's wrestling, swimming, and tennis eliminated at University at Albany); Elton Alexander, The Plain Dealer, Apr. 6, 1994, at 3D (Kent State plans to cut men's gymnastics

and ice hockey teams leaving it with 8 women's and 8 men's athletic teams); David Barron, The Houston Chron., June 29, 1993, at 1 (men's basketball program eliminated to make way for women's softball); John Maher, *Out of the Running*, Austin American-Statesman, Jan. 22, 1995, at 1 (Blinn College dropped world-renowned man's track program, which produced 11 Olympians and a gold medal winner at the 1992 games).

Whole sports -- most notably, men's wrestling, swimming, and gymnastics -- have been nearly extinguished at the university level. In a period of ten years, men's wrestling lost 120 programs. Paul Kenyon, *The Buck Stops Here: Budgetary Decisions Hinge on Title IX*, Providence J. Bull., Feb 28, 1995. at 2F. Over the last two decades, at least sixty-four universities have discontinued their men's swimming program. In 1976, 138 NCAA universities offered men's gymnastic programs. Twenty years later, only thirty-two varsity teams remain in the whole nation. Jessica Gavora, *Quota System Hurts Team*, USA Today, July 23, 1996, at 14A. *See also* Jim Naughton, *Colleges Weigh Impact Of Ruling On Gender Equity In Sports*, The Chronicle of Higher Education, Dec. 6, 1996, at A57 ("Financial concerns have led many universities to drop men's programs such as baseball, wrestling, gymnastics, and cross-country, which produce no revenue and drive up the number of female athletes a university needs to achieve proportionality."); Bonnie DeSimone, *Show of Hands Saves Men's Gymnastics*, The Plain Dealer, Jan. 11, 1995, at 1D ("Men's gymnastics, the spotted owl of collegiate sports, will maintain its precarious perch for at least two more years."); Tom Witosky, *Iowa Coach Wrestles With Impact*, Des Moines Register, May 9, 1995, at 2C (Iowa wrestling coach testifies before

Congress; "wrestling programs are becoming Title IX casualties").

These, and many of the other men's programs most threatened by the current interpretation of Title IX, are Olympic sports, for which the university system has traditionally provided the vast majority of competitive training. As Robert Cowan, then-men's national program director for the U.S. Gymnastics Federation predicted, "It's the death of Olympism. People don't need to worry about the NBA of the NFL. They should be much more concerned about the survival of Olympic programs." Jeff Metcalfe, *Olympic Suicide; Experts Analyze ASU Athletic Program Cuts*, The Phoenix Gazette, Feb. 28, 1993, at G3.

In their attempts to reach proportionality, universities have not only cut whole teams, but have placed strict limits on the size of the roster of the remaining men's teams, thereby effectively eliminating "walk-on" opportunities for non-scholarship athletes. Jim Naughton, *More Colleges Cut Men's Teams To Shift Money To Women's Teams*, The Chronicle of Higher Education, Feb. 21, 1997, at A39. In this way, universities have sacrificed a very low-cost way of providing athletic opportunities to interested male students to the goal of strict numeric parity.

The adverse effect of the these cuts are severe and long lasting. Individual male college athletes, obviously, have only a single two- or four-year opportunity to participate in and reap the benefits of varsity athletics. Once this singular opportunity is missed, it cannot be revisited. Similarly, universities that dismantle longstanding recruiting, training, and competitive programs cannot easily reconfigure them. Rebuilding discontinued teams can be expected to take

several years, lengthening the duration of the harm to affected male student athletes.

The real tragedy of the courts' distorted view of Title IX is that it inflicts tremendous harm on male student athletes without providing a comparable benefit to female student athletes. As Brown amply demonstrated at trial and other commentators agree, women students as a whole are measurably less interested in varsity athletics than men students. *See* Jim Naughton, *Colleges Weigh Impact of Ruling On Gender Equity In Sports*, The Chronicle of Higher Education, Dec. 6, 1996, at A57 (quoting Louis M Guenin, a member of the division of medical ethics at the Harvard University Medical School; "The evidence has mounted from published studies and experience that a smaller portion of female than male undergraduates desire varsity play. This has dramatized the untenability of requiring that the ratio of male to female athletes equal the ratio of male to female students."). Thus, schools that wish to move to gender parity are forced artificially to restrict male athletic opportunities to the current level of female interest -- harming male athletes while providing little or no benefit to female athletes.

In addition, schools that cut programs to achieve substantial proportionality will be very reluctant to expand their varsity athletic program in the future for either sex, resulting in an effective "freeze" on athletic programs for athletes of both sexes. As one commentator noted in a discussion of this litigation:

> If Brown University currently has 500 men but only 300 women participating in varsity athletics (close to the actual numbers), the institution can comply with Title IX by reducing the number of male

> athletes to 300. Then Brown University women who might want to participate in the future miss out forever on the opportunity, and so do 200 Brown University men. Where are the winners?

Stephen P. Erber, *Proportionality Will Rebuff Both Male And Female Athletes*, The Chronicle of Higher Education, Dec. 6, 1996, at B6.

B. The Application Of The Current Reading Of Title IX Outside Of The Athletic Context Will Harm Both Male And Female Students

Title IX applies not just to athletics, but to "any education program or activity." 20 U.S.C. § 1681(a).[3] Thus, the First Circuit's interpretation of Title IX to require gender parity (or the full accommodation of every member of the underrepresented sex), could logically be extended far beyond the athletic context with disastrous effects for students of both sexes.

There are numerous areas of campus life in which male and female students elect to participate in differing numbers. In selected activities, ranging from the noncompetitive athletic arena to the arts, participation by women greatly exceeds that of men. For example, evidence introduced by Brown indicates that 91 percent of all applicants expressing an interest in dance are women, 56 percent of all applicants indicating an interest in drama are women, and 66 percent of

---

[3]The breadth of Title IX's coverage was specifically reaffirmed by the Civil Rights Restoration Act of 1987, 20 U.S.C. § 1687, which explicitly extended the reach of Title IX to all aspects of an educational institution receiving federal assistance.

the applicants interested in music are women. App. 1217a. The logic of the lower court's decision would allow any man that was denied a space in an oversubscribed acting, dance, or music class to demand that women be dropped to make room for a number of men proportionate to their enrollment in the student body. Indeed, a man who believes that the theatrical pieces presented by the Drama Department do not offer an adequate number of parts for men or do not cater to male dramatic tastes could assert a similar demand.

Similarly, the mix of undergraduate degrees conferred differs between the genders. Recent statistics from the Department of Education indicate that 69 percent of Bachelors Degrees awarded in the physical sciences in 1989/1990 went to men, while 85 percent of the engineering degrees in that same year went to men. *See* Table 250, *Earned Degrees Conferred*, Digest Of Educational Statistics, U.S. Dep't of Education, 1992. Conversely, women outnumber men in the number of degrees conferred in many areas of the arts and humanities. *Id.* Obviously, these statistics suggest that women and men undergraduates differ in their academic interests. The demands of proportionate representation imposed by the lower court decision here, however, could be read to require that universities begin enforcing substantial proportionality in the awarding of science and engineering degrees. The result of this would be the award of fewer science degrees to men, reducing the overall number of scientists and engineers in society, or a reduction in standards for science and engineering degrees -- either of which would have tragic results for health and safety.

Innumerable other examples could be cited, but it is clear that the mechanical application of gender proportionality without regard to the interests and abilities of undergraduate

students has the potential to cause a variety of absurd and counterproductive results. These results, which arbitrarily limit the opportunities of members of one gender based on the aggregate interest level of the other gender, undermine rather than further the central goal of Title IX by diminishing rather than expanding the opportunities for male and female students.

CONCLUSION

For the foregoing reasons, *amici* WLF, IWF, and Allied respectfully request that this Court grant the petition and issue a writ of certiorari to the First Circuit.

Respectfully submitted,

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Supreme Court, U. S.
FILED
MAR 21 1997
CLERK

(12)

No. 96-1321

In The

Supreme Court of the United States

October Term, 1996

BROWN UNIVERSITY, et al.,

Petitioners,

vs.

AMY COHEN, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court of Appeals For The First Circuit Case No. 95-2205

BRIEF OF *AMICUS CURIAE* COLLEGE FOOTBALL ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF AMICUS CURIAE

The College Football Association ("CFA") was formed in 1977 to improve major college football by upgrading academic standards for players, improving recruitment practices, and broadening television exposure for college teams. CFA's 69 members include all of the universities that participate in the Atlantic Coast Conference, the Big East Conference, the Big 12 Conference, Conference USA, the Southeastern Conference, the Western Athletic Conference, as well as independent schools such as Notre Dame and the Military and Naval Academies.

CFA and its members share a commitment to fulfill the mandate of Title IX, 20 U.S.C. §§ 1681-1688, by expanding athletic opportunities for women and enabling women – as well as men – to develop their full potential in athletics. CFA recognizes, however, that college football is at the heart of the dilemma created by the judgment of the United States Court of Appeals for the First Circuit in this case.

The Court of Appeals interpreted Title IX to require participation by men and women in varsity athletic programs in statistical proportion to their enrollment. If an institution has an equal number of men and women in the student body, the court's ruling means that the institution must have equal numbers of male and female participants in varsity athletics. That might be achievable – but for football. There is no sport for women comparable to football. The easiest solution – one that is consistent with Title IX – is to exempt football from the

opportunities for participation that are counted in determining proportionality.

Intercollegiate football is unique among sports: the size of the teams and the revenue the teams produce distinguish football from other sports, both men's and women's. The Court of Appeals' interpretation of Title IX requires universities either to expend scarce resources on additional intercollegiate teams for women or to eliminate existing intercollegiate teams for men. Eliminating football, at least at CFA member schools, is not a likely solution because the revenue from football supports all other sports and the traditional goodwill generated by football attracts alumni contributions to all programs within a university.

Amicus CFA files this brief to describe its view of the flaws in the Court of Appeals' analysis and to explain the negative consequences of that analysis for all students at CFA member institutions.

ISSUE ADDRESSED

Whether a university violates Title IX when it takes the nature of particular sports into account and accommodates the athletic interests and abilities of male and female students equally effectively even though men and women do not participate on the university's varsity teams in proportion to their enrollment.

REASONS FOR GRANTING THE PETITION

I. The Ruling Below.

The Court of Appeals acknowledged that it is "unlikely" that "the athletic establishments of many coeducational universities reflect the gender balance of their student bodies." *Cohen v. Brown University* ("*Cohen II*"), 991 F.2d 888, 898 (1st Cir. 1993); Pet. App. 189a. It also acknowledged that "in an era of fiscal austerity, few universities are prone to expand athletic opportunities." *Id.* Nevertheless, the Court ruled that a claim of unlawful sex discrimination can be made under Title IX if the plaintiff shows "disparity between the gender composition of the institution's student body and its athletic program" and that "the underrepresented gender has not been 'fully and effectively accommodated by the present program.' " 991 F.2d at 901-02; Pet. App. 189a. The Court's ruling was based on a three-part test in a "Policy Interpretation" issued by the Department of Health, Education and Welfare (now the Department of Education) in 1979. 45 C.F.R. Part 86 (1979).

According to the Court, if a school does not meet the proportionality requirement, it "must fully and effectively accommodate the underrepresented gender's interests and abilities, even if that requires it to give the underrepresented gender (in this case, women) what amounts to a larger slice of a shrinking athletic-opportunity pie." *Cohen II*, 991 F.2d at 906; Pet. App. 198a. The Court noted that compliance with Title IX may be

achieved "by reducing opportunities for the overrepresented gender." *Id.* at 899 n. 15; Pet. App. 183a.[1]

Cohen II affirmed the entry of a preliminary injunction requiring Brown University to provide university-funded women's gymnastics and volleyball teams. Brown had also cut – for financial reasons – university-funded men's golf and water polo teams; the injunction did not restore those teams. After trial on the merits, the majority of a different First Circuit panel adhered to the legal test developed at the preliminary injunction stage of the case. *Cohen v. Brown University* ("*Cohen IV*"), 101 F.3d 155 (1st Cir. 1996).

II. The Impact of the Ruling Below.

The legal test in *Cohen II* will have a dramatic impact on all men's sports, including football. Despite the expansion of women's athletic programs after Title IX's passage in 1972, women continue to participate in varsity, club and intramural sports far less often than do men. To meet a proportionality requirement, a university must either induce more women to participate in sports in order to accommodate the numbers of men who are eager to be part of a competitive sports program or reduce the number of intercollegiate sports opportunities for men.

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[1] Relying on *Cohen II*, 991 F.2d at 898, another appellate court ruled that the University of Illinois could eliminate its men's swimming program without violating Title IX because men's participation in athletics – even after the elimination of the swim team – would "continue to be more than substantially proportionate to their presence in the University's student body." *Kelley v. Board of Trustees*, 35 F.3d 265, 270 (7th Cir. 1994).

Given limited financial resources, universities are more likely to reduce the sports opportunities for men. Participation by men in intercollegiate athletics decreased by 5.7% between 1984 and 1994, a result of financial limitations at universities and colleges throughout the country. NCAA Participation Statistics Report, 1994.

Not surprisingly, college programs reflect the participation rates at the high school level – about 62% male and 38% female.[2] The Sports and Recreational Programs of the Nation's Universities and Colleges, NCAA Report Number 8 and The National Federation of State High School Associations Survey Data, 1994. Two million girls play on high school teams, compared with 3.4 million boys. State High School Associations Survey Data, 1994. The number of slots on intercollegiate teams at National Collegiate Athletic Association ("NCAA") institutions is about 295,000. NCAA Participation Statistics Report, 1994. If participation rates remain the same from high school to college, only one in 18 high school athletes will participate in intercollegiate athletics. If, however, women are entitled to about half of the NCAA slots, based on their proportion in the college population,[3] one

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[2] Three times as many men as women play intercollegiate club sports, and eight times as many men as women play on college intramural teams. NCAA Gender Equity Study, Summary of Results, March 1992, and CFA Participation Survey, July 1994.

[3] Not all student bodies are approximately half male and half female. Georgia Tech's student enrollment is 75% male and 25% female. The University of North Carolina has a student population that is 42% male and 58% female.

in 14 female high school athletes will participate in intercollegiate athletics compared with one in 23 male athletes.

Reduction of athletic opportunities for men may be accomplished either by reducing the size of men's teams or by reducing the number of men's teams. More likely, a decrease in athletic opportunities for men will reduce the number of men's teams because men's teams on average are larger than women's. Football teams are the largest teams in intercollegiate athletics. The average football squad at the NCAA Division 1-A level has 117 members.[4] The next largest men's teams in Division 1 are lacrosse, with an average of 39 members, track and field with 36, and baseball with 34. NCAA Gender Equity Study, Summary of Results, March 1992. The largest women's teams in Division 1 are lacrosse, with an average of 27 members, and track and field, with an average of 25. *Id.*

Although *Cohen II* may result in the elimination of some football teams – or their reduction in size – it is unlikely that football will be eliminated at CFA member schools. Football provides the revenue that supports the other athletic programs. According to the CFA's most recent financial survey for the 1994-95 academic year, football was responsible for 63 percent of the total revenue generated to fund a member's athletic program. Men's basketball generated an additional 20 percent of an athletic department's revenue. Revenue from women's

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[4] Approximately 50 team members play in a game; the team members who do not regularly play in scheduled games play as the "scout team" at all practices, providing opponents for the specialized "starting teams" and gaining experience for future competitive play.

sports was less than one percent of the total income, an average of approximately $90,000 per member. Average operating costs for women's sports were $1.9 million.

Football revenues are crucial to college athletic programs, and successful football programs produce increased alumni contributions for a broad range of university programs. Instead of eliminating football, universities are more likely to eliminate a number of other men's teams to compensate for the size of football teams.

III. The Governing Statute, Regulations and Policy Interpretation.

The legislative history of Title IX reflects the unique position of football in intercollegiate athletics. Title IX of the Education Amendments of 1972 provides:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

20 U.S.C. § 1681(a). The Javits Amendment to Title IX, adopted by Congress in 1974, further provides:

> The Secretary of [HEW] shall prepare and publish . . . proposed regulations implementing the provisions of Title IX of the Education Amendments of 1972 relating to the prohibition of sex discrimination in federally assisted education programs *which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports.*

Pub. L. No. 93-380, 88 Stat. 612 (1974) (codified at 20 U.S.C. § 1681 note) (emphasis added). Congress adopted

section 844 after the Conference Committee deleted a Senate floor amendment that would have exempted revenue-producing athletics from Title IX. 45 C.F.R. Part 86, 44 Federal Register at 71,413.

The regulations that Congress directed in 1974 provide as follows:

> (a) *General.* No person shall, on the basis of sex, be excluded from participation in . . . any interscholastic, intercollegiate, club or intramural athletics offered by a recipient. . . .
>
> (b) *Separate teams.* Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose of major activity of which involves bodily contact.
>
> (c) *Equal Opportunity.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors

> . . . Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes. . . .

34 C.F.R. § 106.41 (1995).

The three-part test that provides the basis of the Court of Appeals' ruling does not appear in Title IX or its implementing regulations. Instead, it is a relatively brief part of a lengthy Policy Statement promulgated by HEW's Office for Civil Rights in 1979. The Policy Statement describes the three-part test as follows:

> 5. In effectively accommodating the interests and abilities of male and female athletes, institutions must provide . . . the opportunity for individuals of each sex to participate in intercollegiate competition. . . .
>
> a. Compliance will be assessed in any one of the following ways:
>
> (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
>
> (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or

> (3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

44 Fed. Reg. 71,413 (Dec. 11, 1979). The three-part test – considered in isolation by the Court of Appeals – does not refer to the nature of particular sports.

IV. The Legal Standard Applied by the Court of Appeals Is Irreconcilable with Title IX and the Implementing Regulations, Which Require that a University Take the Nature of Particular Sports into Account When It Accommodates the Athletic Interest and Abilities of Male and Female Students Equally Effectively.

The Court of Appeals' legal analysis is not supported by the language or purpose of Title IX or the implementing regulations. Title IX requires universities to equally accommodate the athletic interests of both men and women. Title IX does not require universities to provide representation of men and women on varsity teams in statistical proportion to enrollment. The Court of Appeals, however, in effect mandated numerical equivalence and concluded that whenever there is statistical imbalance, the university must fully accommodate all athletic interests and abilities of women, regardless of the

impact that accommodation may have on other university programs.

Relying on § 106.41(b) of the regulations implementing Title IX, the dissenting judge in *Cohen IV* suggested that the simplest way of resolving the problems that arise from the Court's legal analysis would be to allow exclusion of the members of a football team from the calculation of proportionality. 101 F.3d at 192-93; Pet. App. 70a-71a. Under the regulation, universities are allowed to have men's teams in contact sports without providing a matching team for women or allowing women to try out for the men's team. (In fact, of the contact sports, only football, wrestling and boxing are without corresponding women's teams.) Counting the participants in football, the contact sport that requires a large number of participants, "skews the numbers of athletic participants – making it impossible for the university to provide both men's and women's teams in other sports." 101 F.3d at 192-93, Torruella, C.J. dissenting; Pet. App. 71a.

The dissent recognizes that the Javits Amendment to Title IX directs the administering agency to take into account the nature of particular sports in assessing compliance: the agency should consider the varying number of players needed for different sports when assessing compliance with Title IX. Recognition of the fact that there is no intercollegiate sport for women that involves the large number of participants that are on a football team takes into account the nature of football. If football is taken out of the proportionality equation, it is easier and more realistic to provide intercollegiate sports participation opportunities for both men and women that are

proportionate to enrollment and that reflect student interest.

The portion of the Policy Interpretation relied upon by the Court of Appeals does not make an adjustment in the overall proportionality requirement to take into account that women are not involved in football, even though football is a key component in the overall demand for sports. The failure to exclude football from the proportionality requirement results in universities trying to induce women to participate in sports, not so that they will benefit, but in order to be able to accommodate men who are eager to be part of a competitive sports program.

The *Cohen II* Court's interpretation of the three-part test in the Policy Statement overlooked the Policy Interpretation Summary, which states: "Pursuant to the regulation, the governing principle in this area is that the athletic interests and abilities of male and female students must be *equally effectively accommodated*." 44 Fed. Reg. 71,414 (Dec. 11, 1979) (emphasis added). Without basis in the language of Title IX, its implementing regulations or the record in this case, the Court assumed that interest and ability to participate in sports is equal as between all men and women on all campuses.

It is "more logical that interest in participation and levels of ability to participate as percentages of the male and female populations will vary from campus to campus and region to region and will change with time." *Pederson v. Louisiana State University*, 912 F. Supp. 892, 913-14 (M.D.La. 1996). Allowing each university or college to equally effectively accommodate the athletic interests of male and female students prevents interference with the

freedom of academic institutions to choose their mix of students, to control the emphasis they wish to place on particular sports, and to foster a learning experience for all students.

CONCLUSION

The United States Court of Appeals for the First Circuit has misinterpreted Title IX and its implementing regulations. Title IX does not mandate numerical proportionality. Rather, it requires equal opportunity to participate in intercollegiate athletics for both sexes. Equal opportunity to participate is to be assessed not in a rote numerical fashion, but in a common sense fashion – by taking into account the nature of a sport and the athletic interests and abilities of male and female students. The Court's decision creates the legal and practical problems described in Brown's Petition for Writ of Certiorari and has negative consequences for all students at CFA member institutions. Therefore, amicus CFA urges the Court to grant the Petition and issue a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAR 21 1997
CLERK

No. 96-1321 (13)

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1996

BROWN UNIVERSITY et al.,
Petitioners,
vs.
AMY COHEN et al.,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
For the First Circuit
Case No. 95-2205

BRIEF OF THE STATE OF COLORADO AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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No. 96-1321

IN THE SUPREME COURT OF THE UNITED STATES
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BROWN UNIVERSITY et al.,
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Respondents.

On Petition for Writ of Certiorari
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BRIEF OF THE STATE OF COLORADO AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

INTERESTS OF AMICUS CURIAE

The State of Colorado[1] believes that the ruling and rationale below requires State-supported schools and universities to violate the Fourteenth Amendment to the United States Constitution in order to comply with 20 U.S.C. § 1681 ("Title IX"). As detailed below, a divided panel of the United States Court of Appeals for the First Circuit has announced an interpretation of Title IX that requires that one gender be given preferential treatment and

[1] This brief is also joined by the State System of Higher Education of Pennsylvania.

imposes a quota concerning representation. Such an interpretation is contrary to the Fourteenth Amendment.

Amicus curiae submit this brief to focus attention on the contradiction between the mandate of the Fourteenth Amendment and the analysis of the First Circuit and to illuminate the negative consequences for state-supported institutions of higher education and school districts.

REASONS FOR GRANTING THE WRIT

Colorado, like every State in the Union, has established and operates public schools and universities.[2] Many of these educational entities participate in intercollegiate or interscholastic athletics and virtually all receive federal funds in some form. Thus, like Brown University, they are required to comply with Title IX as it applies to intercollegiate and interscholastic athletics.

This means that, under the First Circuit's analysis, an institution must do one of three things to comply with Title IX. First, each gender's representation in varsity athletics[3] must be substantially proportionate to its representation in the student body.[4] In short, if one gender is fifty percent of the student body, its representation among varsity athletes must approximate fifty percent.[5] Second, an institution may demonstrate that it has a continuing history of expanding opportunities for the underrepresented gender.[6] Presumably, this periodic expansion must continue until such

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[2] The State System of Higher Education of Pennsylvania consists of fourteen state-owned institutions of higher education.

[3] The First Circuit's emphasis on varsity athletics, rather than club and intramural sports, means that the judicial inquiry is limited to an elite. Only four percent of college students participate in varsity athletics. *Athletes Are Small Group With Impact* (*USA Today*), March 3, 1997 at 4C. Limiting the inquiry to such a small elite is unusual This Court would never limit its inquiry into whether a school district was unitary by focusing exclusively on the composition of gifted and talented classes. Similarly, compliance with Title IX should not turn on the gender representation of only the elite.

[4] It is unclear exactly what constitutes substantial proportionality. This ambiguity must be resolved so that institutions have clear guidance.

[5] If substantial proportionality is defined as each gender having a representation in athletics which is within five percentage points of the gender's representation in the student body, then only nine of 108 NCAA Division I-A schools met this criteria with respect to representation for women. However, of those nine, three (the U.S. Air Force Academy, the U.S. Military Academy, and the U.S. Naval Academy) do not meet this criteria with respect to representation for men. Thus, only six of 108 NCAA Division I-A institutions meet the criteria for both men and women. *Passing the Test* (*USA Today*), March 3, 1997 at 4C. At the Division I-AA level, only seven of 117 institutions meet this criteria. *Passing the Test* (*USA Today*), March 4, 1997 at 6C. If only eleven of the 225 institutions in NCAA Divisions I-A and I-AA have met the criteria, then one must question the viability of this criteria for measuring compliance with Title IX.

[6] As a practical matter, this means that teams have been added in the last three years. *How to Comply with Law* (*USA Today*), March 3, 1997 at 4C ("The [Office for Civil Rights of the United States Department of Education] has considered actions taken in the last three years as signs of continuing expansion").

time as substantial proportionality is reached.[7] Third, an institution may demonstrate that it is currently meeting all interests and abilities of the underrepresented gender. Presumably, this means that the institution must periodically survey the underrepresented gender and add a new team every time there is an indication of an unmet interest and ability until substantial proportionality is achieved.[8]

Although public schools and universities must comply with this mandate, they must also comply with the constraints of the Fourteenth Amendment.[9] Yet, Title IX, as interpreted by the court below, is contradictory to the Fourteenth Amendment. Quite simply, a public institution

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[7] In effect, the First Circuit's interpretation allows institutions which are "continually expanding" opportunities for the underrepresented gender to escape Title IX liability under the second part of the test. Thus, an institution which added numerous teams for the underrepresented gender during the 1970's and 1980's, but has not added teams recently will be found in violation. In contrast, a second institution which did nothing in the 1970's and 1980's escapes liability by making minimal additions for the underrepresented gender. This is true even though the second institution may have a far greater gap between the genders. The second institution can continue to avoid liability by making the token effort of adding another team in a few years. In effect, the institutions that practiced resistance are deemed in compliance while those that made early efforts to expand opportunities in good faith are punished.

[8] Because students are constantly entering and leaving the institution, survey data quickly becomes useless. Thus, if an institution is going to demonstrate that it is filling all needs and thereby meets prong three, it must do surveys on a constant basis.

[9] Of course, similar constraints may be imposed by state or local law. The only constraint imposed by federal law is the requirements of Title IX.

cannot adhere to the First Circuit's interpretation of Title IX and also adhere to the Fourteenth Amendment.

I. THE FIRST CIRCUIT'S INTERPRETATION REQUIRES PREFERENTIAL TREATMENT ON THE BASIS OF GENDER IN VIOLATION OF THE FOURTEENTH AMENDMENT.

The Fourteenth Amendment is "essentially a direction that all persons similarly situated . . . be treated alike." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). Consequently, differing treatment on the basis of gender will rarely be upheld. *See United States v. Virginia*, 116 S. Ct. 2264 (1996); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *Orr v. Orr*, 440 U.S. 268 (1979); *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Craig v. Boren*, 429 U.S. 190 (1976). Indeed, after *Virginia*, gender classifications will be upheld only if: (1) there is an exceedingly persuasive justification for the gender classification; and (2) the gender classification is substantially related to an important government objective. *Virginia*, 116 S.Ct. at 2275. *See also id.* at 2291 (Scalia, J., dissenting) (*Virginia* "drastically revises our established standard for reviewing sex-based classifications"). This is true regardless of the gender which is favored by the classification. *Hogan*, 458 U.S. at 730 ("That this statute discriminates against males does not exempt it from scrutiny or reduce the standard of review").[10]

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[10] Indeed, this Court has emphatically rejected the notion that "benign" discrimination is subjected to a lesser standard. *Adarand*, 115 S.Ct. at 2113 (citations omitted). *See also Croson*, 488 U.S. at 495; *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975). *Cf. Adarand*, 115 S. Ct. at 2118-19 (Scalia, J., concurring) (no recognition of a debtor or creditor race); *Id.* at 2119 (Thomas, J., concurring) (no racial paternalism exception).

Yet, under the First Circuit's reasoning, public schools and universities are required to give preferential treatment on the basis of gender.[11] Members of the underrepresented gender have certain entitlements and members of the overrepresented gender face discrimination.

To illustrate, in 1992, Colorado State University decided to discontinue its men's baseball program with 55 participants and its women's softball program with 18 participants. Since both genders lost a program and since three times as many men's positions were cut, there was no discrimination against women in violation of the Fourteenth Amendment. Indeed, because more men's positions were cut, the decision actually narrowed the gap in representation between the genders and moved the University closer to substantial proportionality. Yet, the U.S. Court of Appeals for the Tenth Circuit found that the decision to eliminate softball violated Title IX and ordered the women's program

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[11] Moreover, the lower court's interpretation assumes that a person's rights depend upon his/her membership in a particular group. This assumption is completely at odds with this Court's observation that "the Fifth and Fourteenth Amendments to the Constitution protect **persons**, not **groups**." *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2112 (1995) (emphasis in original). *See also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 279-80 (1986) (plurality opinion). *Cf. Missouri v. Jenkins*, 115 S. Ct. 2038, 2065 (1995) (Thomas, J., concurring). (The Fourteenth Amendment demand that children must be regarded "as individuals, not simply as members of racial, ethnic, or religious groups"); *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 172 (1977) (Brennan, J., concurring) ("an explicit policy of assignment by race may serve to stimulate our society's latent race-consciousness"); *Wright v. Rockefeller*, 376 U.S. 52, 66 (1964) (Douglas, J., dissenting) ("Here the individual is important, not his race, his creed, or his color.").

reinstated. *See Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 829-32 (10th Cir.), *cert. denied*, 510 U.S. 1004 (1993).

The message of *Roberts* and the First Circuit's decision is clear. If an institution wishes to satisfy the first part of the test, substantial proportionality between the genders, it may eliminate positions for the overrepresented gender with impunity. However, the institution dare not eliminate positions for the underrepresented gender. *See Kelly v. Board of Trustees of the Univ. of Illinois*, 35 F.3d 265 (7th Cir. 1994), *cert. denied*, 115 S.Ct. 938 (1995) (No Title IX violation when team from the overrepresented gender was eliminated in order to improve the representation of the underrepresented gender). Consequently, institutions achieve compliance not by expanding opportunities for the underrepresented gender, but by cutting opportunities for the overrepresented gender.[12]

Similarly, if an institution is pursuing compliance through the second option, continuous expansion, it will be adding teams for the underrepresented gender while freezing or even cutting teams for the overrepresented gender. Moreover, if an institution is pursuing compliance through the third option, meeting every need of the underrepresented gender, it will be creating new opportunities for the underrepresented gender whenever there is interest and ability in a particular sport and ignoring the unmet interests and abilities of the overrepresented gender. In effect, the

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[12] Indeed, since 1992, universities have discontinued ten men's swimming teams, eight men's tennis teams, and seven men's gymnastics programs. After 1996-97, Syracuse University will drop men's wrestling and men's gymnastics and Michigan State University will drop men's lacrosse and fencing. *Scorecard: Spare the Axe* (*Sports Illustrated*), February 24, 1997 at 22, 25.

First Circuit's interpretation gives a preference to the underrepresented gender and mandates discrimination against the overrepresented gender. Such a result is incompatible with a Constitution which does not tolerate classes among its citizens. *See Romer v. Evans*, 116 S. Ct. 1620, 1623 (1996) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559-60 (1896) (Harlan, J., dissenting)).

More importantly, the First Circuit's mandate for gender discrimination is not supported by an "exceedingly persuasive justification." *Virginia*, 116 S. Ct. at 2275. Although this Court has not had the opportunity to precisely define what constitutes an exceedingly persuasive justification in the context of gender classifications, the definition would appear to be similar to the concept of a compelling state interest in the context of a racial classification. Thus, the cases interpreting compelling interest can be useful guides.

In deciding what is a compelling interest, this Court has rejected the desire to have greater representation from specific groups, *Board of Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 307 (1978) (Powell, J., announcing the judgment of the Court), the elimination of societal discrimination, *id.* at 307-09, the need for diverse role models, *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (plurality opinion), and compliance with the demands of the federal government. *Miller v. Johnson*, 115 S. Ct. 2475, 2490-91 (1995). Indeed, the only interest which has been found to be compelling is the need to remedy the present day effects of specific incidents of prior discrimination. *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2117 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 496-97 (1989). *See also Metro Broadcasting, Inc. v. Federal Communications Comm'n*, 497 U.S. 547, 612 (1990) (O'Connor, J., joined by Rehnquist,

C.J., Scalia, and Kennedy, JJ., dissenting) ("modern equal protection doctrine has recognized only one such [compelling] interest: remedying the effects of racial discrimination.").

Thus, is an "exceedingly persuasive justification" is somewhat analogous to a compelling interest, the proposed justifications of increasing the representation of one gender, eliminating societal discrimination against one gender, creating role models of a particular gender, and complying with the wishes of federal agencies would be insufficient to justify the discrimination against the overrepresented gender. Indeed, the only certain definition of exceedingly persuasive justification is remedying the present day effects of past intentional discrimination against the underrepresented gender.[13] In sum, the gender discrimination mandated by the First Circuit's interpretation of Title IX cannot be reconciled with the requirements of the Fourteenth Amendment.

Even if the concept of exceedingly persuasive justification were not deemed to be closely analogous to the concept of compelling interest in the context of racial discrimination, the First Circuit's interpretation still raises grave Fourteenth Amendment concerns. In other contexts, this Court has placed substantial limitations on anti-

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[13] These findings must be highly specific. Although the findings of legislative bodies are generally entitled to great deference, *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488-89 (1955), a classification cannot rest on some generalized assertion that discrimination exists in society or in a particular agency or institution. *Croson*, 488 U.S. at 500-01; *McLaughlin v. Florida*, 379 U.S. 184, 190-92 (1964). These findings of previous intentional discrimination have to be highly specific. *Croson*, 488 U.S. at 510-511 (quoting *Fullilove v. Klutznik*, 448 U.S. 448, 539 (1982) (Stevens, J., dissenting)).

discrimination plans. *See Johnson v. Transportation Agency*, 480 U.S. 616, 638 (1987) (stating that in an equalization plan, no persons may be excluded automatically based solely on gender); *Steelworkers v. Weber*, 443 U.S. 193, 208 (1979) (cautioning against any equalization plan which, as a matter of course, replaces workers of one race with those of another). Given these pronouncements, an interpretation which sanctions discrimination on the basis of gender as a means of benefiting the other gender must be regarded with suspicion.

II. THE FIRST CIRCUIT'S INTERPRETATION IMPOSES A QUOTA IN VIOLATION OF THE FOURTEENTH AMENDMENT.

The Fourteenth Amendment does not mandate a specific level of representation for a particular group, *see Freeman v. Pitts*, 503 U.S. 467, 493-94 (1992) (no duty to correct racial imbalances caused by housing patterns); *Milliken v. Bradley*, 418 U.S. 717, 740-41 (1974) (no constitutional right to a specific racial balance in schools), and prohibits governmental attempts to artificially achieve specific levels of representation. *Bakke*, 438 U.S. at 316-18 (Powell, J., announcing the judgment of the Court). In fact, the underlying rationale for having quotas, that a certain group's representation in a particular profession or activity should correspond to its representation in a given population, "rests on the completely unrealistic assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population." *Croson*, 488 U.S. at 507 (quoting *Sheet Metal Workers v. E.E.O.C.*, 478 U.S. 421, 494 (1986) (O'Connor, J., concurring in part and dissenting in part)). In sum, as long as such underrepresentation is the product of private choices, it is

perfectly permissible for certain groups to be underrepresented. *Freeman*, 503 U.S. at 493-94.[14]

However, under the lower court's reasoning, a specific level of representation is arbitrarily mandated and artificially achieved. A gender's representation among varsity athletes must correspond to its representation in the student body. If an institution has not achieved substantial proportionality between the genders, it has four options: (1) add teams for the underrepresented gender periodically until such time as substantial proportionality is achieved; (2) cutting opportunities for the overrepresented gender immediately so that substantial proportionality is achieved; (3) add a team every time there is an indication of an unmet interest and ability among the underrepresented gender until substantial proportionality is achieved; or (4) some combination of the first three options. All four options eventually will result in an athletic program where each gender's representation mirrors its representation in the student body. The question is not **whether** the quota will be reached but **when**. Such a result is inconsistent with a constitutional scheme that does not mandate or assume a particular level of representation for a given group.

Moreover, in mandating this specific level of representation, the lower court assumed that each gender's

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[14] Moreover the mere fact that certain groups are underrepresented is not, by itself, sufficient to establish intentional discrimination in violation of the Constitution. *Washington v. Davis*, 426 U.S. 229, 250-52 (1976); *Mayor of Philadelphia v. Educational Equity League*, 415 U.S. 605, 620 (1974). *See also* 3 Ronald R. Rotunda & John E. Nowak, *Treatise on Constitutional Law*, §18.4 (2d ed. 1992) ("statistical proof of differing impact among racial groups would not be sufficient to establish a racial classification absent some other proof . . .").

interest exists in lockstep proportion to its representation in the university student body.[15] Such an assumption is entirely unrealistic. *Croson*, 488 U.S. at 507. Indeed, the evidence from high schools is to the contrary. Although young women comprise more than fifty percent of all high school students, they constitute less than forty percent of high school athletes.[16] Furthermore, Title IX is in no way limited to athletic programs. In fact, the legislative history scarcely even mentions intercollegiate or interschool athletics, *see* 118 Cong. Rec. 5,807 (1972); 117 Cong. Rec. 30,407 (1971), focusing instead on the wide variety of programs and course offerings throughout secondary and post-secondary education. Consequently, there is no reason why the First Circuit's reasoning would not be equally applicable to the composition of a particular institution, a particular program, or even a particular course. Indeed, application of a different test for some or all of these areas would substantially contradict the single dictate of the statute

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[15] As in *Mayor of Philadelphia*, "the simplistic percentage comparisons undertaken by the Court of Appeals lack real meaning" in determining whether discriminatory exclusion has occurred here. 415 U.S. at 620.

[16] In determining whether a particular gender is underrepresented in intercollegiate athletics, it is imperative to use the appropriate statistical pool. "When special qualifications are required to fill particular jobs, comparisons to the general population (rather than the smaller group of individuals who possess the necessary qualifications) may have little probative value. *Croson*, 488 U.S. at 501 (quoting *Hazelwood School Dist. v. United States*, 433 U.S. 299, 308 n.13 (1977)) (parenthetical original in *Croson*). "[W]here special qualifications are necessary, the relevant statistical pool for purposes of demonstrating exclusion must be the number of minorities qualified to undertake the particular task. *Croson*, 488 U.S. at 501-02.

which prohibits discrimination in "any education program or activity". 20 U.S.C. § 1681(a) (emphasis added).

Thus, since young women constitute fifty percent of the population, they should have fifty percent of the slots at the service academies.[17] Similarly, since young men constitute fifty percent of the population, they should have fifty percent of the slots in nursing, elementary education, or occupational therapy programs. The possibilities that, for whatever reason, young men are more interested in attending the service academies or that young women are more likely to enter certain fields is irrelevant. *But cf. Equal Employment Opportunity Comm'n v. Sears, Roebuck & Co.*, 839 F.2d 302, 320-21 (7th Cir. 1988) (describing evidence supporting conclusion that, men tend to prefer commission sales positions more than women do). The only thing that matters under the lower court's interpretation of Title IX is that "substantial proportionality" among the genders is achieved. A test with such broad and crucial ramifications warrants the review and consideration of this Court. *Cf. Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977) (certiorari granted "to consider a substantial question affecting the enforcement of a pervasive federal law").

III. TITLE IX SHOULD BE INTERPRETED AS BEING COEXTENSIVE WITH THE FOURTEENTH AMENDMENT.

Although the First Circuit's interpretation of Title IX is contrary to the Fourteenth Amendment, the proper

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[17] At present, young women constitute fifteen percent of the enrollment at the U.S.-Air Force Academy, fourteen percent at the U.S. Naval Academy, and twelve percent at the U.S. Military Academy. *Passing the Test* (*USA Today*), March 3, 1997 at 4C.

interpretation is that Title IX is coextensive with the Fourteenth Amendment. Title VI, 42 U.S.C. § 2000d, which prohibits racial discrimination in education, was the model for Title IX. *Grove City College v. Bell*, 465 U.S. 555, 566 (1984).[18] Title VI is coextensive with the Fourteenth Amendment's prohibitions on racial classifications. *Guardian Ass'n v. Civil Service Comm'n of the City of New York*, 463 U.S. 582, 589-90 (1983) (White, J., announcing the judgment of the Court) ("Title VI on its own reaches no further than the Constitution . . ."); *id.* at 639-41 (Stevens, J., dissenting); *Bakke*, 438 U.S. at 287 (Powell, J., announcing the judgment of the Court) ("Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment"); *id.* at 328 (Brennan, J., joined by White, Marshall, & Blackmun, JJ.) ("Title VI prohibits only those uses of racial criteria that would violate the Fourteenth Amendment").[19] Since Title IX was modeled on Title VI

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[18] *See also* Sex Discrimination Regulations: Hearings Before the House Subcommittee on Post Secondary Education of the Committee on Education and Labor, 94th Cong., 1st Sess. 16, 150 (1971) ("the setting up of an identical administrative structure and the use of virtually identical statutory language substantiates the intent of Congress that the interpretation of Title IX was to provide the same coverage as had been provided under Title VI") (comments of Senator Bayh).

[19] *See also* Non-Discrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964, 59 Fed. Reg. 8755, 8758-59 ("The Supreme Court has made clear that Title VI prohibits intentional classifications based on race or national origin to the same extent and under the same standards as the Equal Protection Clause of the Fourteenth Amendment"); William A. Kaplin & Barbara A. Lee, *The Law of Higher Education*, 802 (3d ed. 1995) ("Courts have generally held that Title VI incorporates the same standards for identifying unlawful discrimination as have

and since Title VI is coextensive with the Fourteenth Amendment, then Title IX also should be coextensive with the Fourteenth Amendment. In effect, Title IX, like Title VI, should extend the protections of the Fourteenth Amendment to private educational entities.[20]

Under this interpretation of Title IX, if an educational institution chose to sponsor competitive athletics, it would have to treat both genders alike in terms of scholarships, opportunity for competition, equipment, facilities, number of coaches, quality of coaches, travel arrangements, etc. All basketball players would be treated alike regardless of whether they were on the men's team or the women's team. In terms of determining what teams were sponsored for each gender, the institution would have accommodate the interests and abilities of both genders *to the same extent*. Thus, if one gender had interest and ability in ten sports and the other had interest and ability in eight sports and if the institution chose to accommodate every interest and ability, one gender would have ten sports and the other would have eight. The institution would not be forced to assume that both genders had equal desires to participate.

Similarly, if an institution had to cut teams, it would have to do so in a gender neutral fashion. If an institution which was accommodating all of the interests and abilities for both genders were to decide that it could only

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been developed under the Fourteenth Amendment's Equal Protection Clause").

[20] Although Title VI and Title IX are applicable to public institutions which receive federal funds, those institutions are already bound by the Fourteenth Amendment. Thus, the application of these statutes (as opposed to implementing regulations) has no practical effect on public institutions.

accommodate one-half of the expressed interests and abilities, then it would have to cut half of the teams for both genders. Conversely, if an institution which was accommodating half of the interests and abilities decided to accommodate all of the interest and abilities, it would have to add teams for both genders. Title IX, like the Constitution, would no longer tolerate classes among its citizens. *Romer*, 116 S.Ct. at 1623.

CONCLUSION

At the end of the day, our Constitution recognizes only one race, one gender, one class -- the American People. It does not tolerate differing treatment on the basis of gender and it does not tolerate the imposition of quotas concerning a gender's representation. This case presents this Court with an ideal opportunity to reinterpret Title IX so that it is consistent with the Fourteenth Amendment.

For the reasons set forth above, Colorado urges this Court to grant the Petition and issue Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Respectfully submitted this 20th day of March, 1997.

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REPLY BRIEF

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(14)

No. 96-1321

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

BROWN UNIVERSITY, *et al.*,
Petitioners,
v.
AMY COHEN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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REPLY BRIEF OF PETITIONERS

From the outset of this litigation, respondents have contended that a violation of Title IX can be based upon a statistical disparity between the gender composition of a university's athletic program and its student body without proof that male and female students share an equal interest in varsity participation, even if this interpretation effectively requires universities to afford varsity opportunities to qualified women in preference to similarly situated men. Having staked their entire case on these issues at every turn in the lower courts, respondents now assert that they are not properly before this Court. *See, e.g.*, Brief in Opposition ("Opp.") at 14-17. Respondents' efforts to evade review are meritless. The First Circuit never made any finding that Brown would be liable for discrimination if Title IX requires proof of intentional discrimination, or if it requires proof of a disparate impact to be based upon a comparison with the pool of qualified athletes seeking varsity opportunities.[1] There accordingly would not be anything "advisory" about an opinion reversing the only theory relied upon by the First Circuit to impose liability on Brown. Opp. at 14. As the briefs of the amici persuasively illustrate, this case presents issues of exceptional importance that warrant review.

A. This Case Squarely Presents the Questions Raised in the Petition

1. There is no merit to respondents' claim that the district court found Brown liable on an "independent ground," or that any such finding would bar review here. Opp. at 16-17. Respondents concede that "the First Circuit did not address" the allegedly "independent ground" (Opp. at 11 n.10, 17), and this Court routinely grants

[1] Both issues are included in Question 1 of the Petition ("Pet."), which challenges the First Circuit's interpretation of a Title IX plaintiff's prima facie case. Contrary to respondents' assertion (Opp. at 4 n.4), Brown contends that a violation cannot be predicated solely on proof of a numerical disparity in the selection of teams. *See* Pet. at 4; 34 C.F.R. § 106.41(c)(2)-(10).

certiorari to review grounds relied upon by the courts of appeals even though there may be some other basis for reinstatement of the judgment on remand.[2] In addition, the "independent ground" relied upon by respondents to bar review here could not in fact support a finding of liability if the First Circuit's analysis of Title IX is reversed. The district court's alternate ground rested on one finding: "far more male athletes are being supported at the university-funded varsity level than are female athletes." Cohen III at 144a. But there is no dispute that the percentage of varsity positions funded by the university was actually higher for women than men. *Id.* at 96a-97a; 158a. It is apparent, therefore, that this finding rests on nothing more than the numerical difference between men and women athletes at Brown, and the relevance of that difference to proof of a Title IX violation is squarely presented by this petition. Pet. at (i).

2. Contrary to respondents' assertion, the district court never made any finding that Brown selected sports "without regard to [men's and women's] interests and abilities." Opp. at 14.[3] Nor did the district court find that Brown

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[2] *See, e.g., Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 580 (1978) (reversing finding of liability under Title VII because the court's analysis of the prima facie case was incorrect, and declining to reach "alternative theories of liability [that were not] directly addressed" by the Court of Appeals); *Wards Cove v. Atonio*, 490 U.S. 642, 655 (1989) (reversing finding of liability based upon an improper statistical analysis without resolving "whether the record made in the District Court will support a conclusion that a prima facie case . . . has been established on some [other] basis"). The case cited by respondents, *United States v. Hastings*, 296 U.S. 188, 193-94 (1935), involved a direct criminal appeal from the District Court pursuant to a limited statutory grant of appellate jurisdiction, and is completely inapposite.

[3] Respondents' sole support for this assertion is the district court's finding that Brown's selection of sports and recruitment "predetermines" the gender balance of its program, but the district court did not find that 'predetermin[ation]' was improper or that it reflected disregard for the relative interests of men and women. It instead found this fact relevant to its interpretation of the term "*substantially* proportionate." Cohen III at 118a-20a (em-

purposefully sought to disadvantage women. Cohen III 85a-147a.[4] The district court in fact observed that Brown made its decisions to withdraw funding for both men's and women's teams "in an effort to comply with its understanding of Title IX's directives." Cohen III at 86a. *See also, id.* at 140a (noting that Brown has "improved the quality of its women's program[s]" after the initial expansion in the 1970s); Cohen II at 169a (Brown "promptly" added "fourteen women's varsity teams" when it became coeducational). The issue in this case is accordingly not whether Brown intended to treat men and women fairly under Title IX, as that must be presumed on this record, but whether its "understanding of Title IX's directives" was correct.

3. It also must be presumed for the purpose of resolving the legal issues presented in the petition that there are substantially more men than women in the group of qualified athletes seeking to compete in varsity athletics at Brown because the First Circuit did not reject this contention "based on the evidence introduced at trial." Opp. at 9 (emphasis deleted). The Court stated unequivocally that statistical evidence "assessing the level of [each gender's] interest in sports" was "completely irrelevant" to proof of Brown's liability under Title IX because such evidence "cannot justify providing fewer athletics opportunities for women than for men" even if "it can be

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phasis added). The lower courts and the plaintiffs in fact share the view that it is just fine for Brown to "predetermine" the gender ratio of its program as long as that ratio mirrors the student body ratio.

[4] Respondents' statement (Opp. at 1) that Brown "knew 'full well' that the women's teams (unlike the men's teams) would be unable to continue" when it withdrew funding for four teams in 1992 is not supported by their sole citation to a sentence in the district court's preliminary injunction opinion. The sentence did not say that Brown knew that the men's teams, but not women's teams, could continue without university funding (Cohen I at 232a); was not adopted in the liability phase (Cohen III at 99a); and is irrelevant to the theory of liability adopted by the court. *See, e.g.*, Cohen III at 86a & n.2, 138a-145a.

empirically demonstrated that, at a particular time, women have less interest in sports than do men." Cohen IV at 41a-42a. *See also*, Cohen II at 184a & n.16, 187a (acknowledging that "it might well be that more men than women at Brown are currently interested in sports" but rejecting the relevance of that fact to liability under Title IX).

The district court's observations about Brown's evidence on this issue accordingly do not bar review of the theory relied upon by the First Circuit. *See* n.2, *supra*. The district court did not, in any event, make any factual finding that liability could be imposed based upon an analysis of the qualified pool. First, respondents' assertion (Opp. at 10 n.9) that Brown's claim was "unproven" is beside the point, because the plaintiff bears the burden of proving the gender composition of the qualified applicant pool (Cohen II at 186a; Cohen III at 136a), and none of plaintiffs' three experts witnesses ever testified that a relatively equal number of qualified men and women seek to participate in varsity athletics, nor have plaintiffs so contended. Second, the district court did not make factual findings on this issue. The court simply cited the "theoretical and practical problems" associated with a qualified pool analysis as an additional reason to "confirm[] [its] initial conclusion" that "defendant's interpretation of [Title IX] is incorrect." *Id.* at 128a; 130a; 126a-30a; 134a-36a.

Nor did the First Circuit adopt the district court's suggestion that proof of a qualified pool "may be insurmountable" (Cohen III at 130a) if required by Section 1681.[5] The Court instead found "no error in the district court's refusal to apply Title VII standards" based on the con-

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[5] The First Circuit in fact acknowledged that survey evidence of athletic interests could be relevant to determining whether there were any "unmet interests" of women athletes, but found such evidence was not relevant to that issue here because "unmet interest" had been established through proof that there were women's teams actively competing that were not being funded by the university. Cohen IV at 41a-43a, & n.15.

clusion in Cohen II that the "Title VII concept of the 'qualified pool' has no place in a Title IX analysis of equal opportunities" as a matter of law because "the controlling statutes and regulations are clear." Cohen IV at 39a, 37a. The First Circuit accordingly did "refuse[] to consider" Brown's evidence in determining whether Brown had violated Section 1681, and did not "reject[] Brown's 'relative interest' argument as 'unproven'." Opp. at 10 n.9.[6]

4. Contrary to respondents' assertions (Opp. at 12, 15-16, 23-25, 26), the petition provides an ideal opportunity to decide whether the interpretation of Title IX at issue effectively requires universities to afford preferential treatment to women in contravention of 20 U.S.C. § 1681(b) and the Equal Protection Guarantee. First, respondents mistakenly contend that the First Circuit "affirmed the district court's finding, as a factual matter, that Brown failed to prove that the 'full and effective accommodation of the interests and abilities of Brown's female students would disadvantage Brown's male students.'" Opp. at 12. The lower courts' opinions leave no doubt that their view of compliance does "disadvantage Brown's male students" and leads to preferential

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[6] The First Circuit stated only that the *cause* of women's relative lack of interest was "unproven." Cohen IV at 39a. Statistical evidence of the gender composition of the group of qualified applicants is required in a discrimination case, however, without regard to the fact that an imbalance in that pool may have been caused by an historic lack of opportunities in the field. *See, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 499 (1989) (holding that the disparity between the percentage of city contracts awarded to minority businesses and the number of minorities in the population did not support a finding of discrimination even though "there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs"); *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 309, 311 (1977) (defendant not responsible for statistical disparities caused by pre-Act discrimination and qualified pool should exclude minorities who would not be in the pool but for prior affirmative action in the relevant market.)

treatment.[7] Under the First Circuit's view, Brown could achieve compliance by funding all viable women's teams without funding all viable men's teams (Cohen IV at 59a), or by eliminating positions for approximately 213 qualified men while providing funded positions for all but 40 of the qualified women. *Id.* at 58a-59a. This means that Brown could comply with Title IX by fully accommodating 89% of the qualified female athletes while accommodating less than 62% of the qualified male athletes. Cohen III at 96a-97a, 163a. *See also*, Cohen II at 184a & n.16 (using a hypothetical to explain that a university that has not achieved gender parity could comply with Title IX by offering opportunities to 100% of the interested women and only 50% of the interested men because a "university can provide as many (or as few) additional slots for men as it sees fit").

Second, the questions in the petition are not predicated on the view that the First Circuit's test permits a finding of liability based solely on evidence that a university has failed to achieve immediate compliance with a numerical quota. Opp. at 15, 23. The petition acknowledges that the First Circuit permits three ways to establish Title IX compliance. *See, e.g.*, Pet. at 15.[8] But respondents fail to come to terms with the fact that where men and women are not equally represented in the qualified pool, all three paths to compliance effectively require some type of preference, ranging from a strict numerical quota (part one), to a set aside for qualified women in numbers calculated to correspond either to the total number of women quali-

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[7] The statement cited by respondents simply said that "[t]he district court did not find" that male students would be disadvantaged by the accommodation of all the women (Cohen IV at 8a) (emphasis deleted) but that is because the district court declined to make any factual findings on the issue of relative interests. *See also* Cohen III at 163a.

[8] As the first question in the petition reflects, however, the First Circuit held that "a Title IX plaintiff makes out an athletic discrimination case by proving numerical disparity, coupled with unmet interest," and the defendant bears the burden of establishing uninterrupted program expansion. Cohen II at 190a.

fied to compete on viable teams (part three) or ever-increasing numbers (part two), up to the student body ratio. Pet. at 7-9, 20-22. In addition, the lower court opinions unequivocally confirm that parts two and three of the policy interpretation can only be used as a way station on the road to "gender parity." *See, e.g.*, Cohen II at 183a (institutions must increase the numbers "until the opportunities . . . are equivalent by gender.")[9]

Third, respondents contend that the question whether the Court's interpretation of the standards governing liability under Title IX is consistent with the Equal Protection Guarantee is not properly presented because the Court based its interpretation of Title IX on the need to redress an "adjudicated determination" of discrimination by Brown and not "societal discrimination" against women. Opp. at 16. That assertion ignores the clear holding of the First Circuit in Cohen II that any "gender classification slanted somewhat in favor of women" that might arise out of its interpretation of Title IX is constitutional because "Congress has broad powers under the Fifth Amendment to remedy past discrimination." App. at 187a. This analysis was expressly reaffirmed in Cohen IV at 48a,[10] and there is no legal or prudential bar to this Court's review of that issue.[11]

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[9] Brown's petition accordingly accurately asserts that it would have to "set aside *up to* 51%" of its varsity program for qualified women under the Court's interpretation (Pet. at 2) (emphasis added), and that these standards "effectively require" (*see infra* at 10) universities to afford preferences "in an effort" to achieve gender balance. *Id.* at (i). *See Opp.* at 15 & n.14.

[10] Although Cohen IV independently reviewed the constitutionality of the district court's remedial order (App. at 48a, 51a), a court's power to order a gender-conscious remedy based upon proof that the *defendant* engaged in discrimination presents a distinct issue that is not in dispute here. *See*, Pet. at 14 n.10.

[11] Brown did not waive this issue (Opp. at 13 n.13), which was raised and decided twice, and has standing, because it has been held liable under Title IX, and has a right to argue that the statute should be interpreted consistent with the Constitution under settled rules of statutory construction. *See* Pet. at 24.

B. The First Circuit Has Decided Federal Questions of Exceptional Importance in a Manner That Conflicts With This Court's Precedents

1. On the merits, respondents say precious little. Respondents do not dispute the fact that Section 1681(b) was patterned after Title VII, that under such circumstances this Court has accorded its Title VII decisions precedential weight, and that the First Circuit did not adhere to the disparate impact analysis required by this Court in *Wards Cove* and other Title VII decisions. Opp. at 19-22. Respondents instead contend that these Title VII precedents cannot be applicable to Title IX because they only concern the use of statistics "to show that the denial of jobs" to women and minorities "is not random, but rather is the result of purposeful discrimination"—an inquiry they say is not relevant here because "the percentage of women participating in athletics is never the result of chance . . . [but] the deliberate result of the number and size of women's and men's teams that the university chooses to sponsor." Opp. at 20.

The disparate impact analysis under Title VII, however, is in fact designed to prohibit allocation of opportunities through use of a "selection mechanism," *Wards Cove,* 490 U.S. at 653, that has an unwarranted "disparate impact" on one race or gender without regard to intent. *Id.* at 644, 684 n.4. There is no "disparate impact," however, when the defendant has awarded opportunities to women in proportion to their numbers in the qualified applicant pool. *See, e.g., Wards Cove*, 490 U.S. at 650; *Hazelwood,* 433 U.S. at 309. In addition, respondents do not even attempt to explain why it is "discriminatory" for Brown to use an athletic selection practice that produces the same gender ratio as a completely "random" process, but not discriminatory to use a gender-driven selection practice that dramatically skews the ratio in favor of women.[12]

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[12] Respondents do not challenge Brown's assertion that a purely random assignment of positions to all qualified athletes seeking

Respondents also claim that this Court's precedents disavowing standards that effectively require preferential treatment are inapplicable because the standard at issue does not "mandate[] statistical balancing." Opp. at 23 (emphasis deleted). That of course is not the *sine qua non* of "preferential treatment." *See, e.g., Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 258 (1981) (evidence that an employer had selected a male when a qualified female had applied for the position could not establish liability because "it is the plaintiff's task to demonstrate that similarly situated employees were not treated equally," and this theory would give rise to "preferential" treatment); *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978) (set aside for up to 16 qualified minority applicants constituted preferential treatment barred by Title VI and the Equal Protection Clause).

Respondents' equal protection analysis similarly ignores the First Circuit's concession that there is "scant legislative history regarding Title IX as it applies to athletics" (Cohen IV at 46a), and fails to acknowledge that preferences adopted to remedy societal discrimination—as distinct from a prohibition of discriminatory practices that deny equal opportunity—cannot be sustained if the principal beneficiaries are women who have not been actual victims of discrimination. *See* Pet. at 25-26.[13]

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varsity participation would not produce a 50/50 gender ratio if women represent less than 50% of the qualified pool. Pet. at 7-9 & n.5. Further, their claim that it is difficult to identify the qualified pool (Opp. at 21-22) cannot justify a departure from Title VII cases because similar difficulties exist there. *See e.g., Hazelwood*, 433 U.S. at 309-11; *Wards Cove*, 490 U.S. at 649-50.

[13] Brown does not contend that "female athletes are not burdened by the denial of the opportunity to compete, so long as they have been able to prepare for competition." Opp. at 27-28. Brown contends that accomplished male and female athletes are equally burdened "by the denial of the opportunity to compete" at the collegiate level, and it would be unconstitutional to compel schools to afford those opportunities to qualified women in preference to similarly situated men in an effort to generate increased athletic interest among other disinterested women. *See e.g., Wygant v.*

Respondents do not dispute the fact that the interpretation adopted by the First Circuit in 1992 has posed compliance problems for almost every university in the nation and fueled a widespread reduction of opportunities for men. Opp. at 28-29. Instead, respondents suggest that these developments are of no consequence because the lower courts have not "required school[s] to cut men's sports teams," and a "school always has the option of simply increasing its women's program." Opp. at 28.

As the First Circuit recognized, however, "Title IX does not purport to override financial necessity," and many schools do not have the resources to pursue that option "[i]n an era where the practices of higher education must adjust to stunted revenues [and] careening costs" by "curb-[ing] spending on programs, like athletics, that do not lie at the epicenter of their institutional mission." Cohen II at 197a-98a. *See* also App. at 300a (OCR recognition that Title IX compliance presents a problem "in the face of increasing budget constraints.") In addition, the First Circuit cautioned universities choosing this path to compliance that "[s]taying on top of the problem is not sport for the short-winded" because "the institution must remain vigilant" by continually expanding its program for women "until the opportunities for, and levels of, competition are equivalent by gender." Cohen II at 183a. That is not a "simple" solution or an acceptable burden to place on universities such as Brown that are already providing equal opportunity to men and women alike, especially where that rule "would almost inexorably lead to the use of numerical quotas"—a result that "Congress and this Court have rejected repeatedly in the past." *Wards Cove*, 490 U.S. at 652. This court should grant certiorari.

Jackson Bd. of Educ., 476 U.S. 267, 274, 276 (1986) (plurality opinion) (invalidating minority preference designed to provide role models to redress effects of societal discrimination).

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